No. 71-653

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-653

THOMAS S. GIBSON, ET AL.,
APPELLANTS,

VERSUS

L. M. BERRYHILL, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JURISDICTIONAL STATEMENT

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In the
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OCTOBER TERM, 1971

No. ————

L. M. BERRYHILL, ET AL.,
Appellants,

VERSUS

THOMAS S. GIBSON, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

Appellants appeal directly from the judgment of the United States District Court for the Middle District of Alabama (a three-judge panel convened pursuant to 28 U.S.C. § 2284), entered on September 3, 1971, denying the motion to dismiss of the appellants, restraining and enjoining appellants, Thomas E. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr, and Willard Smith, individually and as members of the State Board of Optometry and their successors in office from conducting a hearing on the charges

heretofore preferred against the appellees optometrists to determine what action should be taken on the evidence produced at a hearing on said charges and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Opinion of the District Court is not yet reported. Copies of the Opinion of the Court and Judgment are attached as Appendix A.

JURISDICTION

The appeal herein is from a final Judgment made and entered by the United States District Court for the Middle District of Alabama, Northern Division, specially constituted under 28 U.S.C. §§ 2281 and 2284 holding unconstitutional Sections 192 and 206, Title 46, 1940 Code of Alabama, two state statutes and granting appellees injunctive and other relief. The Judgment appealed from was made and entered on September 3, 1971. Notice of Appeal was filed in the United States District Court for the Middle District of Alabama, Northern Division, on September 22, 1971. The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by 28 U.S.C. § 1253 in that a final judgment was entered granting, after notice and hearing, a permanent injunction in a proceeding required to be heard and determined by a district court of three judges. The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on

direct appeal in this case. *Flash* v. *Cohen*, 392 U.S. 83 (1968); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Zwicker* v. *Koota*, 389 U.S. 241 (1967); *Perez* v. *Ledesma*, 91 S.Ct. 674 (1971).

The state statutes that are involved are Sections 192 and 206 of Title 46, Code of Alabama, which provide, as follows:

"Title 46

"§ 192. (2875) State board of optometry; how constituted.—The governer shall appoint a state board of optometry consisting of five persons each of whom shall be a citizen of the United States, over the age of twenty-five years, a member in good standing of the Alabama optometric association, incorporated, or its legal successor, and shall have been engaged in the actual continuous practice of optometry in the State of Alabama for at least five years next preceding his appointment. One member of said board shall be appointed each year for the term of five years and shall hold office until his successor is appointed and qualified. The governor may remove from office at any time any member of the board for neglect of duty, incompetency, improper or unprofessional conduct, or when the license or certificate of any member has been suspended or revoked. Vacancies on said board shall be filled by appointment by the governor in the manner hereinbefore provided. The governor shall furnish each member of said board at the time of his appointment a certificate of appointment, and each appointee shall qualify by taking the usual oath of office before the judge of probate of his home county within fifteen days from date of his appointment. (Ib.)"

Section 206:

"* * * Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same, and a copy of the charges, which must be made in writing, and verified by oath, together with a notice of the time and place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be effected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of license as herein provided for, the holder may appeal to the circuit court, or other court of like jurisdiction, in the country in which the person whose license or certificate is ordered revoked resides. (Ib.)"

All of Section 206 is shown as Appendix B.

QUESTIONS PRESENTED

1. Whether Section 192, Title 46, of the optometry law, Code of Alabama, is unconstitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

2. Whether Section 206, Title 46, of the optometry law, Code of Alabama, is unconstitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

3. Whether Board Rule No. 1 additionally protected the rights of plaintiffs if an appeal was taken from an adverse board ruling, after hearing, in view of the general right to supersede as provided by the Alabama law; also in holding that the State Board is illlegally constituted.

4. Whether the court erred in enjoining the State Board of Optometry and their successors in office from hearing these pending charges against the plaintiffs because of alleged pecuniary gain, bias or prejudice, before a hearing, when mandamus is provided in the Alabama law to test these questions, with right of full hearing in court.

5. Whether the court erred in finding the plaintiffs had been harassed by defendants to their irreparable damage on the evidence before it.

6. Whether the court erred in assuming from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiffs.

7. Whether the court erred in overruling defendant's motion to dismiss this action.

STATEMENT

On August 4, 1965, the Alabama Legislature repealed Section 210, Title 46, 1940 Code of Alabama, and amended Section 211, which does not appear to be involved in this suit.

Section 210 and Section 211 before and after repeal and amendment are attached as Appendix C, because throughout the proceedings on this matter the repeal of Section 210 of the Alabama Optometry Law is frequently referred to. Prior to the repeal of Section 210, optical dispensaries, jewelry stores and such, were permitted to maintain an optometric department wherein eyes were examined so long as it was in charge of an optometrist. After Section 210 was repealed, there was no longer any statutory authority for such stores to maintain such departments as the Alabama courts and others have held. The optometrists employed by Lee Optical Company of Alabama, Inc. (hereinafter referred to as Lee Optical) are the plaintiffs below and appellees in this appeal and for ease of reference will be referred to hereafter as plaintiffs. The State Board of Optometry, defendant below, together with the members of the State Board and other named defendants will be hereafter referred to as defendants and the State Board of Optometry will be referred to as State Board. The plaintiffs were notified by the State Board of the repeal of Section 210 of the optometry law and requested all optometrists to comply with the optometry law as amended and this included the plaintiffs herein. This notice from the State Board is attached hereto as Appendix D.

Lee Optical and the plaintiffs made no effort to comply with the optometry law as amended and continued to advertise "scientific eye examinations" and "eyes examined." The Alabama Optometric Association, one of the defendants herein, and hereafter referred to as the Association, took note of this failure of the Plaintiffs to comply with the amended optometry law and after conducting an investigation, gathered evidence of this fact, and then authorized its president, Dr. Roy Adams, to file charges against each of the plaintiffs before the State Board and this was done and the charges and exhibits attached thereto against Dr. Harry Sparks are the same, in general, as those filed against the other defendants. Appendix D. This was done on October 23, 1965, over two and one-half months after the repeal of Section 210 of the optometry law and notice to the plaintiffs of such repeal. The affidavit of Dr. Roy Adams is attached hereto as Appendix E.

On October 25, 1965, the State Board filed an injunction suit against Lee Optical and the plaintiffs in the Circuit Court of Montgomery County, Alabama, in equity. The plaintiffs in this suit were defendants in the injunction suit along with Lee Optical and all of the defendants in that case filed a plea in abatement in the Circuit Court and this was sustained by the court and the suit dismissed and an appeal was made to the Alabama Supreme Court in this injunction suit. The parties to this injunction suit and the attorneys in the injunction suit for both Lee Optical and the optometrists are the same attorneys representing the plaintiffs in the case on appeal here. There were other suits filed by the State Board seeking injunctions against other

such optical dispensaries operating as did Lee Optical and their employed optometrists, one of which was the suit against the House of $8.50 Eyeglasses, and everyone realized that the determination of the ruling on the motion to abate in the Lee case would be decisive not only in the Lee Optical case but the other cases as well, so there was a general understanding among the attorneys for the respective parties that hearings on the charges filed with the State Board would be held in abeyance awaiting a ruling by the Supreme Court of Alabama on the appeal of the Lee Optical case by the State Board.

During the time the appeal of this Lee Optical case was pending before the Alabama Supreme Court, the Alabama Legislature passed an act giving all state licensing boards the right to bring an injunction suit against those so unlawfully practicing. Its provisions were made retroactive as well as applying to any future actions brought thereunder.

The adoption of this Section 1063(1), Title 7, Alabama Code Annotated was brought to the attention of the Alabama Supreme Court and on September 18, 1969, the Supreme Court rendered its decision, 226 So.2d 623, directing the Circuit Court to overrule the motion to abate and to proceed with the hearing of the case pending before it. As can be seen, this accounted for approximately four years, during which no effort was made to proceed with the charges against the optometrists on the charges pending against them, not only in this case but the other cases pending in other sections of Alabama.

When the Lee Optical case was reinstated, pursuant to the opinion of the Supreme Court in the Circuit Court of Montgomery County, Alabama, a demurrer on behalf of Lee Optical and the plaintiffs in this suit, was filed and without assigning reasons, the demurrers against the plaintiffs herein were sustained and the demurrer against Lee Optical was overruled so the case proceeded to trial against Lee Optical, resulting in a decree in favor of the State Board and against Lee Optical, a copy of which is attached hereto as Appendix F. A copy of this decree was attached to defendants' motion to dismiss and pursuant to Stipulation No. 23 of the stipulations, the inclusion of this exhibit is permitted. An appeal to the Alabama Supreme Court was taken by Lee Optical in this case and it is now at issue and awaiting decision by the Alabama Supreme Court.

The case of the State Board against the House of $8.50 Eyeglasses and their employed optometrists, and the charges pending before the Board against these optometrists, were held in abeyance just as they were in the Lee case. However, in the House of $8.50 case, the optometrists remained in the suit and it was tried, resulting in a decree which is attached hereto and marked Appendix G, and permitted by paragraph 20 of the stipulation. Both the House of $8.50 and their employed optometrists were enjoined from the unlawful practice of optometry and this case is now on appeal to the Alabama Supreme Court with briefs soon to be filed in this case.

The charges pending before the State Board against the plaintiff optometrists herein were scheduled for a hear-

ing on October 20, 1969, after the decision by the lower court in the Lee Optical case in Montgomery County and was continued well ahead of the scheduled hearing date by agreement of the attorneys for the parties. The charges were next scheduled for hearing on May 26 and 27, 1971, and this suit was instituted by the plaintiffs against the defendants and from an adverse decision the defendants are now before this Honorable Court on appeal.

In order to carry this matter along as rapidly as possible ,the defendants ordered a transcript of the proceedings before the three-judge tribunal which has now been filed with this Court and an index to the record is attached hereto as Appendix H.

While this statement may appear unusually long, it is felt that it was essential in order for the argument which follows to be more meaningful.

The three-judge federal court was empaneled and, after final hearing on all issues except as stated in paragraph 5 of the pre-trial order wherein plaintiffs withdrew the charge that the State Board was estopped from prosecuting its suspension of license proceedings against plaintiffs because it had annually renewed their license to practice, and the plaintiffs withdrew without prejudice, their claim for damages, a hearing was held. It denied the motion to dismiss of the defendants and enjoined the named members of the State Board of Optometry of the State of Alabama and their successors in office from conducting a hearing on the charges heretofore preferred against the plaintiffs and dismissed the cross-claim of the defendants without prejudice.

SUMMARY OF QUESTIONS PRESENTED IN THE JURISDICTIONAL STATEMENT

1. WHETHER SECTION 192, TITLE 46, OF THE OPTOMETRY LAW CODE OF ALABAMA IS UNCONSTITUTIONAL UNDER ARTICLE IV, SECTION 2, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This is the section which provides that members of the State Board of Optometry shall be appointed by the governor from a list furnished by the Alabama Optometric Association and further that only those who are members of the Alabama Optometric Association in good standing are eligible for appointment to the State Board. The record will show that the recommendation of the Association was seldom followed and none has been made in recent years. None of the members of the State Board were recommended to the governor by the Association but they were, at the time of their appointment, and still are, members of the Association and in good standing. The trial court held this provision to be unconstitutional. In the case of *McCrory* v. *Wood*, 171 So.2d 251 (decided January 1, 1965), the Alabama Supreme Court held this section to be constitutional and according to Section 1652 of Title 28 U. S. Code, this decision is binding on the federal courts in civil actions in cases where it applies. Numerous other cases from other jurisdictions similarly holding are cited in the Statement.

2. WHETHER SECTION 206, TITLE 46, OF THE OPTOMETRY LAW CODE OF ALABAMA, IS UNCONSTITUTIONAL UNDER ARTICLE IV, SECTION

2 AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This is the section of the optometry law that provides that an appeal from a ruling of the State Board on charges, after hearing, is to the Circuit Court of the county of the residence of the optometrist charged. The trial court held this provision of the optometry law unconstitutional because it fails to provide supersedeas pending an appeal. This section also was held to be constitutional by the Alabama Supreme Court in the case of *McCrory* v. *Wood*, *supra*. We cite both Alabama cases and cases from other jurisdictions which hold that in the absence of providing supersedeas, the Alabama courts have the inherent authority to provide supersedeas where necessary to preserve the rights of the parties pending an appeal.

3. WHETHER BOARD RULE NO. 1 ADDITIONALLY PROTECTED THE RIGHTS OF PLAINTIFFS IF AN APPEAL WAS TAKEN FROM AN ADVERSE BOARD RULING AFTER HEARING IN VIEW OF THE GENERAL RIGHT TO SUPERSEDE AS PROVIDED BY THE ALABAMA LAW; ALSO IN HOLDING THAT THE STATE BOARD IS ILLEGALLY CONSTITUTED.

In order to make it clear that the State Board had no desire to take advantage of the optometrists charged in the event of some finding against them, Regulation Number 1 was adopted by the State Board of Optometry and promulgated which specifically states that no action would be taken adverse to the optometrists, after hearing, pending appeal until a final determination on the appeal or abandonment thereof.

Again in *McCrory* v. *Wood, supra,* the rule-making authority of the State Board was upheld so long as it was within the legislative grant to the Board. We cite numerous other Alabama cases in addition, showing that the appellate courts of Alabama are firmly committed to the constitutional right of the Legislature to provide for administrative boards with authority to enact regulations and that a violation of them would be a criminal offense.

4. WHETHER THE COURT ERRED IN ENJOINING THE STATE BOARD OF OPTOMETRY AND THEIR SUCCESSORS IN OFFICE FROM HEARING THESE PENDING CHARGES AGAINST THE PLAINTIFFS BECAUSE OF ALLEGED BIAS, PREJUDICE AND PECUNIARY INTEREST OF THE BOARD MEMBERS BEFORE A HEARING WHEN MANDAMUS IS PROVIDED IN THE ALABAMA LAW TO TEST THESE QUALIFICATIONS WITH RIGHT OF A FULL HEARING IN COURT.

It is the contention of the Defendant members of the State Board of Optometry that they are not biased, or prejudiced against the plaintiffs or that they would receive pecuniary gain as a result of hearing the charges against plaintiffs and they are not and should not be disqualified from hearing these charges. Stipulation No. 11 herein states the individual board members would so testify and that they could render a fair and impartial verdict on the charges brought before them. The Alabama case of *Miller* v. *Aldridge,* 103 So. 835, holds that the proper remedy to compel members of a state board to recuse themselves as disqualified to pass on a petition for revocation of certificate is by mandamus proceeding. This procedure was not followed in this case but instead the plaintiffs filed this

suit in federal court. The Court, in this case, also cites the "doctrine of necessity" which is recognized by other authorities and requires that they should hear and determine the cause, citing 15 R.C.L., page 541, in which is found the following:

> "It is well established that the rule of disqualification of judges must yield to the demands of necessity as, for example, in cases where if applied it would destroy the only tribunal in which relief could be had."

In the *Miller* v. *Aldridge* case, *supra*, the Court considered the ruling in the *Lehmann* case conclusive against injunctive relief. The Supreme Court in this case, 263 U.S. 394, 44 Sup.Ct. 128, 68 L.Ed. —, had the following to say:

> "We cannot * * * assume that the Board will be impelled to action by other than a sense of duty or render judgment, except upon convincing evidence introduced in a regular way, with opportunity of rebuttal."

There are numerous other cases cited supporting this question.

5. WHETHER THE COURT ERRED IN FINDING THE PLAINTIFFS HAD BEEN HARASSED BY DEFENDANTS TO THEIR IRREPARABLE DAMAGE ON THE EVIDENCE BEFORE IT.

Defendants urge there has been absolutely no evidence of harassment of the plaintiffs as alleged in their complaint. The three suits referred to in the complaint were decided in 1954 and 1959 and the *McCrory* v. *Wood* case, *supra*, was decided January 21, 1965, all being prior to the filing of charges involved herein. The other alleged acts on the part of the State Board are not sufficient to dis-

qualify the State Board from hearing the charges pending against plaintiffs. Other cases cited deal with optometry as a profession in the health care field and the commercial practice of optometry involved herein and other cases cited in the statement.

6. WHETHER THE COURT ERRED IN ASSUMING FROM THE EVIDENCE BEFORE IT THAT A HEARING BEFORE THE STATE BOARD OF OPTOMETRY WOULD BE A MERE FORMALITY LEADING TO THE REVOCATION OF THE LICENSES OF THE PLAINTIFFS.

The trial court was not justified in making this assumption from the evidence before it for the reasons set out in the statement and, in addition, in view of the *Lehmann* case, *supra*, which holds against making any such assumption.

7. WHETHER THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO DISMISS THIS ACTION.

We cite numerous cases in the statement, among which is *McCrory* v. *Wood*, *supra*, wherein the Alabama Supreme Court held Sections 192 and 206 of the optometry law to be constitutional and that a state board should not be enjoined because the proper way to challenge the qualifications of board members to sit is by mandamus as pointed out in the *McCrory* v. *Wood*, *supra*, and numerous other citations from other jurisdictions holding that the filing of an injunction suit such as this is not the proper way to raise the questions set out in the first and second causes of action of the plaintiffs' complaint and that the trial court erred in enjoining the

State Board and their successors in office because in Alabama there is no other law providing for the appointment of another optometry board and the action by the trial court left no other tribunal to hear the pending charges.

For the reasons assigned above and in the questions presented, the defendants below and appellants herein urge reversal of the trial court and its granting of an injunction and further, that this suit be dismissed at the cost of plaintiffs, the appellees herein.

THE QUESTIONS ARE SUBSTANTIAL

I.

Whether Section 192, Title 46, of the optometry law, Code of Alabama, is constitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The questions presented on this appeal go directly to the constitutionality of all licensing boards when the court held unconstitutional Section 192, Title 46, Code of Alabama, which is the section that provides that members of the State Board of Optomerty must be members in good standing of the Alabama Optometric Association to be eligible for appointment by the governor as members of the State Board. This provision is contained in most of the laws creating licensing boards not only in the health-care field but in other fields of endeavor also. We urge that the court committed error in holding this section of the optometry law to be unconstitutional and in enjoining the State Board from proceeding to hear the charges pending before it against the plaintiffs in this case. The optometry

law contains no provision for the appointment of another board to hear the charges and no other law in Alabama provides for transferring the hearing to any other board in Alabama. The court erred in also enjoining the successors in office of the State Board of Optometry, which precluded the possibility of the present members of the State Board resigning and requesting the governor to appoint another Board. It is our contention that Section 192 is constitutional and has so been declared by the Alabama Supreme Court in the case of *McCrory* v. *Wood, et al.*, 171 So.2d 251 decided January 1, 1965), when this same question was raised. The Court said:

"(2) It is the position of the appellant that § 192 must be declared unconstitutional because the requirement that appointees of the State Board of Optometry must be 'a member in good standing of the Alabama optometric association, incorporated, or its legal successor * * *.' He insists that the quoted qualification constitutes an unlawful discrimination and deprivation of privileges, immunities and property rights of all licensed optometrists in the state who are not members of the Alabama Optometric Association, Incorporated. It is obvious that any optometrist who works for a corporation and allows his name to be used in advertisements as does appellant would not qualify for membership in the Alabama Optometric Association and therefore would not have the qualifications to serve on the State Board of Optometry under the provisions of this section, even though such employments and acts are specifically authorized by the legislature by §§ 210 and 211, supra.

* * * * * *

"* * * The question seems to be whether there is a substantial and rational relation between the organi-

zation entrusted with the power of nomination or appointment and the function of government which the persons appointed are to perform. If so, then the statutes are generally held to be valid. A general statement on this subject appears at 12 Am.Jur. 231, § 534:

> 'Constitutional attacks have been occasionally made on statutes providing for the establishment of official boards and commissions appointed by private associations and organizations. The argument has been made that such laws amount to the granting of special privileges and to a denial of the equal protection of the laws. The trend of judicial authority is to sustain such legislation.'

For example, the courts have sustained statutes establishing boards of medical examiners to be composed of members appointed by the several medical associations within the state and even permitting one society to name more members than others were permitted to name, and also a statute providing for a municipal plans commission, the members of which were to be appointed by various enumerated organizations."

Further, at 16A C.J.S., *Constitutional Laws*, § 460, p. 179:

> "Statutes have been sustained which have given the right to association or societies of persons belonging to a particular profession to appoint the members of the state board of examiners for the profession, and the same is true of a statute providing that members of the bar shall nominate persons from whom the court shall select jury commissioners, * * *."

There is an extensive annotation in 97 A.L.R.2d 373 on the power of appointment or nomination. The case of *Marks* v. *Frantz* (1956), 298 P.2d 316, found on page 373,

involves the constitutionality of the appointment of an optometry board by the governor from a list of names supplied to him by the Kansas Optometric Association. The Court in upholding the constitutionality of the act stated that where the constitution of the state did not provide a method of appointment, then the Legislature was free to exercise its power in providing for appointments to state boards and the Court stated it was relying on what it deemed the "clear weight of authority" in other jurisdictions, where the courts upheld the constitutionality of such statutes and noted that many examples of restrictive powers of appointment were to be found under various state statutes indicating a settled legislative pattern.

For a partial listing of cases supporting the conclusion of constitutionality of such provisions as contained in Section 192 of the Alabama optometry law, we show a few as follows:

McCurdy v. *Jessop* (1915), 126 Md. 318, 95 Atl. 37, and *Lanza* v. *Wagner* (1962), 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670, 97 A.L.R.2d 344, *App. dismissed* 371 U.S. 74, 9 L.Ed.2d 163, 83 S.Ct. 177, *cert. den.* 371 U.S. 901, 9 L.Ed.2d 164, 83 S.Ct. 205 (both *supra*, § 3(b) in 97 A.L.R.2d 382).

In addition to the above cited cases, we find that Section 1652 of the Federal Rules of Civil Procedure provides as follows:

> "The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in simple actions in the courts of the United States, in cases where they apply."

2.

Whether Section 206, Title 46, of the optometry law, Code of Alabama, is constitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

We believe the court erred in holding Section 206 of the Alabama optometry law unconstitutional for the principal reason that even though an appeal is provided from a ruling of the State Board on charges, after hearing, to the Circuit Court of the county of residence of the optometrists charged (Appendix B), it fails to provide supersedeas pending appeal and the court held this invades the very core of the due process of law and consequently held Section 206 to be unconstitutional.

The court, in its opinion, pointed out that supersedeas is within the power of the state court without such specific statutory authority therefor and cites authority to support this and further that an appeal from a judgment when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends the judgment without such bond and cites Alabama cases to support both contentions. (See the Opinion, pages A2-A9 of Appendix A.) In addition, the case of *Riley* v. *Wilkinson*, 25 So.2d 384, 389 (Ala.), holds that if no supersedeas is provided it is within the inherent authority of the courts of Alabama to provide supersedeas where necessary to preserve the rights of the parties pending appeal, including the right of the Alabama Supreme Court to do so.

The record in this case clearly reflects that there has been no desire or effort on the part of the State Board of

Optometry to take any undue advantage of anyone in the handling of these charges and hearings thereon. They were continued for a number of years by general agreement in order to make a test case involving the corporate employers rather than make a test case out of the charges before the Board by scheduling a hearing on these charges in years past. Upon the filing of this suit, the attorney for plaintiffs was advised that there was no necessity of issuing a temporary restraining order because the Board would voluntarily continue the hearings on the charges before it, involving the plaintiffs herein, and this is reflected in the opinion of the court which mentions that the State Board has voluntarily withheld action on these charges.

The constitutionality of Section 206 of the Alabama law was raised in the case of *McCrory* v. *Wood, supra,* and its constitutionality was upheld except for one provision that was found to be contrary to Section 210 prior to the time it was repealed. (This provision stated the Board could not later adopt the *Rules of Ethics* of the Alabama Optometric Association as its own.)

3.

Whether the Board Rule No. 1 additionally protected the rights of plaintiffs if an appeal was taken from an adverse Board ruling after hearing, in view of the general right to supersede as provided by the Alabama law; also whether the court erred in holding that the State Board is illegally constituted.

In order to make it plain that the State Board had no desire to take advantage of the optometrists charged in the event of some finding against them Regulation 1 was adopted and promulgated which specifically states that no action would be taken adverse to the optometrists, after a hearing, pending an appeal until a final determination on the appeal or abandonment thereof. This regulation is attached as Appendix J.

Again, in *McCrory* v. *Wood, supra,* the rule-making authority of the State Board was upheld so long as the regulation was within the grant to the Board from the Legislature. Other cases upholding the rule-making authority of the state boards are:

In the case of *State* v. *Keel,* 35 So.2d 625, we find that rule-making authority is well settled in Alabama when within the frame work of legislative enactment and quote from this case as follows:

> "The appellate courts of this State are firmly committed to the constitutional right of the Legislature to provide for the creation of administrative boards and commissions with authority to enact regulations and change them from time to time, and that a violation of them will be a criminal offense. Ferguson v. Starkey, 192 Ala. 471, 68 So. 348; McElderry v. Abercrombie,

213 Ala. 289, 104 So. 671; Alabama Public Service Commission v. Mobile Gas Co., 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; State v. McCarty, 5 Ala. 212, 59 So. 543; Ferguson v. Commissioners' Court of Jackson County, 187 Ala. 645, 65 So. 1028; Bond v. State Board of Medical Examiners, 209 Ala. 9, 95 So. 295; Parke v. Bradley, 204 Ala. 455, 86 So. 28; Hill v. Cameron, 194 Ala. 376, 69 So. 636; Horn v. State, 17 Ala. App. 419, 84 So. 883; Reims v. State, 17 Ala. App. 128, 82 So. 576."

According to the record, Dr. Thomas Gibson, member of the Board, verified the bill of complaint against Lee Optical and the plaintiff optometrists (also defendants therein) at the time of filing of the suit in 1965. In order to avoid any possible controversy on this question, the Regulation 1 went on to announce that if Dr. Gibson was challenged for cause, he would be excused from participating in the hearing. It, therefore, appears there could be nothing fairer done by the State Board in protecting or preserving the rights of the persons charged involved in this case.

The finding of the court that the statutes under which plaintiffs are being prosecuted, as they pertain to the plaintiffs' right to appeal from any adverse decision unconstitutional in providing no method of supersedeas pending court review of an adverse finding was error. The court in its opinion cites Alabama cases to the effect that supersedeas is within the power of the courts without statutory authority therefor. In addition, State Board Rule No. 1 provides for automatic supersedeas pending any appeal from an adverse decision and the above holding that this section of the optometry law was unconstitutional is error.

The court committed error in holding that the State Board of Optometry is illegally constituted in that only about one-half of the participating optometrists of the state may participate in the government of their profession. The stipulation, paragraph 7, states the Alabama Optometric Association consists of approximately 100 members. The statement that 192 optometrists are licensed in Alabama is not contained in the stipulation and no doubt came from arguments or one of the briefs. Neither is it mentioned in the pre-trial order. Had it been known that the court would assume that there were 92 optometrists employed by other persons or other entities, just as were the plaintiffs herein, the correct figures would have been immediately forthcoming. These disclose that at the time this suit was filed 113 optometrists were members of the Association and that less than 40 optometrists were employed by other persons or entities such as Lee Optical Company of Alabama, Inc. This leaves 39 optometrists who have their own individual professional practice and for various reasons have elected not to apply for membership in the Association, membership in which is purely voluntary, and in light of these figures, had they been requested, they would show the Alabama Optometric Association is truly representative of the optometrists in Alabama.

Through inadvertence in paragraph 6 of the stipulation, it shows Dr. Ashbee as a member of the State Board at the time of the filing of the complaint and charges against plaintiffs. Dr. George W. Posey was a member at that time and Dr. Ashbee replaced him, upon the expiration of his term, some two or three years later. Since going off of the State Board, Dr. Posey did not continue his member-

ship in the Alabama Optometric Association. Also through inadvertence in paragraph 7 of the stipulation, the reference to American Optical Association should have been American Optometric Association.

In Alabama the question is well settled that optometry is a profession in the health care field. In the case of *Hampton* v. *Bracken's Jewelry Company* (1939), 137 Ala. 212, 186 So. 173, the Alabama Supreme Court, in the opinion in this case, lays the legal predicate upon which relief is sought in these cases by the State Board of Optometry because plaintiffs are charged with violation of several sections of the optometry law as set out in the charges against Dr. Sparks, Appendix D, and should be granted by the Court. From the body of the opinion we quote as follows:

> "The Legislature recognized the fact that no one, without the requisite skill and knowledge, should be allowed to practice optometry, and hence by Section 2880 of the Code a standard examination is required, which shall consist of tests in practical, theoretical and physiological optics, in theoretical and practical optometry, and in the anatomy and physiology of the eye and in pathology as applied to optometry.
>
> "Thus it would appear that the Legislature has seen proper to recognize and regard optometry as a profession, one requiring knowledge of the functioning of the eye, its anatomy, and the pathology as applied to optometry."

In *Busch Jewelry Company, et al.* v. *State Board of Optometry*, 62 So.2d 770, the Mississippi Supreme Court upheld the injunction issued by the Chancellor of the

Chancery Court in Hinds County, Mississippi, wherein he held the following:

> "The Court further finds that Dr. Dooley is not practicing medicine and is only a 'front' for the defendant, Busch Jewelry Company, to practice optometry.
>
> * * * * * *
>
> "It is further the opinion of the Court that the Defendant Busch Jewelry Company, did not employ Dr. Dooley because of any learning or knowledge of the eye that he may have, but solely for the purpose of the practice of optometry by the defendant jewelry company. The defendant, Dr. Dooley, cannot work for the best interest of the unfortunate persons coming into the jewelry store for examination of eyes, but is working solely for the best interest of the defendant jewelry company. In order for the defendant, Dr. Dooley, to receive his pay it is necessary that he prescribe glasses to be sold to the patients by the defendant jewelry company."

Upon appeal, the Mississippi Supreme Court upheld the decision of the lower court and used much the same language in doing so. Busch Jewelry Company and its employee, Dr. Dooley, then appealed this decision of the Mississippi Supreme Court to the United States Supreme Court on certiorari and the Supreme Court denied certiorari—346 U.S. 83, 98 L.Ed. 354, 84 S.Ct. 34.

This brings us to what is often called the Oklahoma case of *Lee Optical of Oklahoma, Inc., et al.* v. *Mac Q. Williamson, Attorney General of the State of Oklahoma, et al.* This Lee Optical of Oklahoma is a subsidiary of the parent Lee Optical Company in Dallas, Texas, just as Lee Optical of Alabama is. This suit was instituted in the Dis-

trict Court of Oklahoma to have an Oklahoma law declared unconstitutional for the reason it allegedly violated various provisions of the Federal Constitution much as the plaintiffs in the case at bar have attacked Sections 192 and 206 of the Alabama Optometry Law. The matter was heard by a District Court of three judges. Upon appeal from the three-judge Court decision, 120 F.Supp. 128, to the U. S. Supreme Court the statute dealing with advertising and other questions of eyeglass fitting and held (75 Sup.Ct. 461, 348 U.S. 483) the statute to be constitutional, a part having been declared unconstitutional by the three-judge Court. In this case we find the following in the opinion:

"An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. Semler v. Dental Examiners, supra. (294 U.S. 608) The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers.

"Fourth, the District Court held unconstitutional as violative of the Due Process Clause of the Fourteenth

Amendment, the provision of § 4 of the Oklahoma Act which reads as follows:

"'No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.'

"It seems to us that this regulation is on the same constitutional footing as the denial to corporations of the right to practice dentistry. Semler v. Dental Examiners, supra. It is an attempt to free the profession, to as great an extent as possible from all taints of commercialism. It certainly might be easy for an optometrist with space in a retail store to be merely a front for the retail establishment. In any case, the opportunity for the nexus may be too great for safety, if the eye doctor is allowed inside the retail store. Moreover, it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism. Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds."

These Supreme Court cases are quoted first to show that optometry cases and commercialism have been before the Supreme Court in other cases and secondly because the same Legislative Act that repealed Section 210 of the Optometry Law drastically limited the right of advertising by also amending Section 211. While this Section is not directly an issue in this case yet it shows how advertising

brings customers to Lee Optical and to the optometrist, either employee or lessee.

With reference to Stipulation 12 in this case, the plaintiffs if called to testify, would testify that Lee Optical Company of Alabama, Inc., had never interfered with their professional practice or professional judgment. In this connection, there are cases which hold that a 10-day cancellation clause in an employment or lease contract between a corporation and optometrist or physician is an exercise of control by the corporation over the optometrist and the nature of his handling patients and the eye examination he conducts. The case of *State ex rel. Beck* v. *Goldman Jewelry Co.*, 51 P.2d 995, involved a situation where the company leased space to a licensed optometrist with a 10-day cancellation clause in the lease. In holding the Jewelry Company was unlawfully practicing optometry the Supreme Court of Kansas said:

> "* * * An examination of the contract between the defendant corporation and its employee Jacobs shows the lack of Jacob's control, for the company can dispense with his services on ten (10) days notice whenever it concludes he is not producing enough sales of glasses to those referred to him for tests of the eyes."

There are other such cases cited in the case of *Sears Roebuck & Co.* v. *Mississippi State Board of Optometry*, 213 Miss. 710, 57 So.2d 726.

The fact that Lee Optical was able to change all of its optometrists from that of employees to lessees almost over night by phone in itself shows control over the optometrists by Lee Optical. In addition on page 328 of the record

or transcript of the testimony of Dr. Gene Shanbaum in the Lee Optical case, he being an official of the Company, said if a lessee optometrist of theirs sent too many of their customers to another outside optometrist over an extended period of time for an examination he would probably cancel his lease. While the questions and answers represented an exaggerated situation it nevertheless demonstrated that the 10-day cancellation clause was a method of control over the lessee optometrists.

While the defendants deny there was any wrong-doing on the part of the members of the State Board in the handling of these charges from the time they were filed in 1965, and continued from time to time by agreement of counsel, we, nevertheless, quote from the case of *Wagner v. Ezell*, 154 S.E.2d 731, on the question of whether there was any impropriety in Dr. Gibon's verifying the bill of complaint filed in the Circuit Court at Montgomery against Lee Optical and the plaintiffs, we quote as follows from the body of this case:

> "The fact, standing alone, that a Board member, acting within the scope of his proper ministerial functions, participated in the origination of the charges against a licensee is not grounds for disqualification.
>
> "In an Annotation appearing in 97 A.L.R.2d 1210, 1214, entitled *Disqualification, for bias or interest, of member of occupation or profession sitting in license revocation proceeding*, it is said:
>
> 'Absent a showing of some other prejudice, bias, or interest, the fact that a member of the hearing tribunal sitting at the license revocation or suspension proceedings also belonged to the professional or occupational organization which initiated or

prosecuted the charges against the licensee is not sufficient reason to disqualify the member.'

"And then continuing at Page 1215 of this same Annotation:

'There is authority from several jurisdictions that disqualification for bias or interest will not result where the hearing body or its subordinates, acting within the scope of their proper ministerial functions, participated in the origination of charges against the licensee.'

"The information which came to the attention of the Board members resulting from their investigation is not greatly, if at all, different from the testimony of Wagner himself, and there is no real dispute as to the evidence or facts involved in this case. Disqualification was not required under these facts."

Then, again we quote from this *Wagner* v. *Ezell* case, *supra*, on the question of the optometry law on appeal, merely providing for an appeal to the Circuit Court of the residence of the optometrists against whom an adverse decision has been rendered. We quote from the body of the opinion as follows:

"Failure of the statute to provide for an appeal does not deprive Wagner of adequate review. In the case of Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22, this Court said:

'The law provides no mode of procedure for appeal from the order of the Tax Commission revoking the license of a retail liquor dealer. It is generally held, however, that the method of reviewing the action of a board or tribunal in revoking a liquor license is by a writ of certiorari, upon the theory

that while such bodies do not exercise the "judicial power of the state," as that phrase is used in conferring judicial power upon the courts of the state, they do exercise a quasi judicial power in such matters.'

"Similar review is available to Wagner."

In the case of *Seidenberg, M.D.* v. *The New Mexico Board of Medical Examiners*, 462 P.2d 469, we find more on the question of initiation of charges and we quote from the body of the opinion as follows:

"The Board is the one tribunal vested with power to revoke a doctor's license, just as the Supreme Court of New Mexico is the only body with power to disbar a lawyer. In State ex rel. Yuhas v. Board of Medical Examiners, 135 Mont. 381, 339 P.2d 981 (1959), it was held that the Board had exclusive jurisdiction of the granting and revoking of certificates admitting physicians and surgeons to practice and, in view of the fact statutes do not provide for disqualification of board members, proceedings before the Board may not be restrained merely by reason of the fact that the Board itself initiated the proceedings against a physician and was, therefore, an interested party. See 42 Am.Jur., Public Administrative Law, § 21 at 312; and Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).

"The fact that the charges are made by the same body which tries the issues does not, in itself, operate as a disqualification. Neither does zeal in the performance of a public duty disqualify. 1 Am.Jur.2d, Administrative Law, § 64, at 861; New Jersey State Board of Optometrists v. Nemitz, 21 N.J.Super. 18, 90 A.2d 740 (1952).

"In Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936), it was held that disqualification will not be permitted

to destroy the only tribunal with power in the premises, although a disqualified member may not act if the law provides for substitution of personnel on the board or court, or if another tribunal exists to which resort may be had.

"* * * The record in the instant case supports the Board's decision by clear and convincing evidence and the decision of the Board is neither unreasonable, arbitrary nor capricious. Appellees, as found by the Board, were guilty of dishonorable and unprofessional conduct and the licenses issued to appellees by the Board should be revoked."

It is a well settled principle of law that a reviewing trial judge cannot substitute his judgment for the judgment of the board following a hearing and this was so held as follows in this *Seidenberg, M.D.* v. *The New Mexico Board of Medical Examiners, supra:*

"We hold that the trial judge substituted his judgment for the judgment of the Board; therefore, the decision of the trial court is reversed and the case remanded with instructions to affirm the decision of the Board.

"It is so ordered."

Again from *Seidenberg, supra,* on the question of constitutionality of a legislative act requiring that Board members be appointed by the governor from a list of 5 nominees for each position from the State Medical Society, the constitutionality of this act was questioned and in the body of the opinion, we find as follows:

"Appellees do not challenge the right of the legislature to create a Board of Medical Examiners and to

vest authority in the Board to institute appropriate disciplinary proceedings for the revocation or suspension of a physician's license to practice medicine. They do complain, however, that the statute creating the Board has usurped the governor's power of appointment of members of the Board by restricting the governor's choice to nominees of the New Mexico Medical Society.

"In accordance with § 67-5-1, supra, the nominees submitted by the Medical Society must be 'qualified.'

"Appellees rely on State ex rel. Swope v. Mechem, 58 N.M. 1 at 6, 265 P.2d 336 at 339 (1954), wherein we quoted from 42 Am.Jur., Public Officers, § 94 at 952:

> '* * * where the Constitution makes the act of appointment an executive one, it cannot be exercised by the legislature, nor can the legislature rob the executive of such power by conferring it on an outside agency of its own choosing.'

We distinguish this from the instant case in that we are not faced with a constitutional delegation to the executive of the power of appointment to the Board. Here, the legislature delegated such power to the executive and may establish qualifications for Board members. New Mexico Constitution, Art. VII, § 2(B), (1967 Pocket Supp.) provides:

> 'The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.'

"It is to be noted that the Board appointed by the governor has the power to grant licenses to qualified physicians to practice medicine, yet appellees contend that the Board could not revoke their licenses to practice. This is incongruous and not a tenable position in

so far as appellees are concerned. See, Annot. 65 A.L.R.2d 662 at 682.

"The constitutionality of a statute is presumed. Doubts concerning its constitutionality are to be resolved in favor of legality and, before a statute may be stricken down, it must clearly appear that it offends applicable constitutional provisions. See, Community Public Service Co. v. New Mexico Public Service Comm'n, 76 N.M. 314, 414 P.2d 675 (1966); Silver City Consol. Sch. Dist. No. 1 v. Board of Regents, 75 I.M. 106, 401 P.2d 95 (1965), and cases cited therein.

"In the Annot. 97 A.L.R.2d 361 at 373, commenting on Marks v. Frantz, 179 Kan. 638, 298 P.2d 316 (1956), we find the following:

> '* * * [P]laintiff sought (1) a determination that an act creating a board of examiners for the examination and registration of optometrists was invalid in that it directed the governor to appoint members of the board from a list of names supplied to him by the Kansas optometric association, thus depriving the governor of his power of appointment and conferring it on a private corporation in violation of the state constitution, * * *. Relying on what is deemed the "clear weight of authority" in other jurisdictions, the court upheld the constitutionality of the statute, noting that many examples of restrictive powers of appointment were to be found under various state statutes, indicating a settled legislative pattern.'

"The governor is obligated to appoint to the Board nominees submitted by the New Mexico Medical Society, and only the governor has this prerogative."

4.

Whether the court erred in enjoining the State Board of Optometry and their successors in office from hearing these pending charges against the plaintiffs because of alleged pecuniary gain, bias or prejudice, before a hearing, when mandamus is provided in the Alabama law to test these questions with right of full hearing in court.

The plaintiffs allege bias, prejudice and pecuniary interest as grounds for disqualification of the members of the State Board of Optometry from proceeding with a hearing of the charges pending before it against the plaintiffs herein. This question in varying aspects has been before the courts many times. It is the contention of the defendant members of the State Board of Optometry that they are not biased or prejudiced against the plaintiffs and they are not and should not be disqualified from hearing these charges. There are cases which hold to the effect that the board hearing charges against a person is, strictly speaking, merely performing an administrative action and a board member who was prejudiced or biased against the accused is not disqualified. *Dyment* v. *Board of Medical Examiners* (1928), 268 Pac. 1073; *Winning* v. *Board of Dental Examiners* (1931), 300 Pac. 866.

This case involves an effort on the part of the plaintiffs to disqualify the members of the Alabama State Board of Optometry and to enjoin them from hearing the charges pending against them. The *Miller* v. *Aldridge* case, 103 So. 835, cited by the plaintiffs and the trial court in support of their position and contention, holds that the proper remedy to compel members of a state board to

recuse themselves as disqualified to pass on a petition for revocation of certificate is by mandamus. This procedure was not followed in this case but instead the plaintiffs filed this suit in federal court. Also in the *Miller* case, the Court cites the "doctrine of necessity" which is recognized by other authorities and requires that they should hear and determine the cause citing 15 R.C.L., page 541, in which is found the following:

> "It is well established that the rule of disqualification of judges must yield to the demands of necessity, as, for example, in cases where if applied it would destroy the only tribunal in which relief could be had."

Cited as in support of the text are: *Bliss* v. *Caille Bros. Co.*, 149 Mich. 601, 113 N.W. 317, 12 Ann.Cas. 513; *In re Ryers*, 72 N.Y. 1, 28 Am.Rep. 88; *Galey* v. *Montgomery County*, 174 Ind. 181, 91 N.E. 593, Ann. Cas. 1912C, 1099; *State* v. *Polley*, 34 S.D. 565, 138 N.W. 300, 42 L.R.A. (N.S.) 788.

In this *Miller* v. *Alridge* case, *supra*, the Court considered the ruling in the *Lehmann* case conclusive against injunctive relief. The Supreme Court in the *Lehmann* case, 283 U.S. 394, 44 S.Ct. 128, 68 L.E. —, said:

> "We cannot * * * assume that the board will be impelled to action by other than a sense of duty to render judgment, except upon convincing evidence introduced in a regular way, with opportunity of rebuttal."

Since the hearings have not been held on the charges pending before the State Board against the plaintiffs, we believe the affidavit of Dr. James L. Cash to be of significant importance in passing on the questions here involved

and his affidavit is attached as Appendix I. Also, the affidavit of Dr. Adams, previously attached as Appendix E, takes on added significance on the question of whether the defendant State Board of Optometry should be permitted to proceed with a hearing on these charges.

Again, returning to 97 A.L.R.2d, page 1214, we find the following:

Absent a showing of some other prejudice, bias, or interest, the fact that a member of the hearing tribunal sitting at the license revocation or suspension proceedings also belonged to the professional or occupational organization which initiated or prosecuted the charges against the licensee is not sufficient reason to disqualify the member.

"Colorado.—State Board of Dental Examiners v Miller (1932) 90 Colo 193, 8 P2d 699, cert den 287 US 563, 77 L ed 496, 53 S Ct 6; State Board of Dental Examiners v Patch (1932) 90 Colo 207, 8 P2d 704; State Board of Dental Examiners v Walsh (1932) 90 Colo 208, 8 P2d 704.

"Illinois.—See Bruce v Department of Registration & Education (1963) 26 Ill 2d 612, 187 NE2d 711, supra § 2[b].

"Louisiana.—Michon v Louisiana State Board of Optometry Examiners (1960, La App) 121 So 2d 565."

In 97 A.L.R.2d, page 1215, we find there is authority from several jurisdictions that disqualification for bias or interest will not result when the hearing body acting

within the scope of their proper ministerial functions, participated in the origination of charges against the licensee.

"United States.—Brinkley v Hassig (1936, CA10 Kan) 83 F2d 351, infra § 4[a].

"California.—Berry v Alderson (1922) 59 Cal App 729, 211 P 836; Winning v Board of Dental Examiners (1931) 114 Cal App 658, 300 P 866.

"Florida.—Hogan v State (925) 89 Fla 388, 104 So 598 (judge held not legally disqualified from proceeding with a disbarment action which he had caused to be commenced pursuant to statute).

"Illinois.—Tarr v Hallihan (1940) 375 Ill 38, 30 NE 2d 421 (where charges against a dentist were filed by an employee of the department which appointed the dentists to sit on the revocation examining committee).

"Minnesota.—Reyburn v Minnesota State Board of Optometry (1956) 247 Minn 520, 78 NW2d 351.

"Montana.—State ex rel. Yuhas v Board of Medical Examiners (1959) 135 Mont 381, 339 P2d 981.

"New Jersey.—Gross v New Jersey State Board of Optometrists (1933) 11 NJ Misc 485, 167 A 25."

While it is undisputed that the charges in this case were initiated by the Alabama Optometric Association through its president, Dr. Roy Adams, rather than by the State Board or any member thereof, the contention of the plaintiffs for disqualification of the State Board in this regard is without merit. While it is true that Dr. Thomas Gibson verified the bill of complaint of the suit filed against Lee Optical Company of Alabama, Inc., and the plaintiff optometrists, his deposition testimony indi-

cates that he did so without going into the merits of the case or forming any conclusion with reference to the plaintiff optometrists and thus in performing a purely ministerial act, should not be disqualified.

Counsel for plaintiffs in their memorandum brief on the merits of the case (R. 548) pending before the three-judge hearing tribunal states, beginning on page 4, that:

> "The involvement of state board members in the investigation and institution of charges against the plaintiffs and the involvement of the board members with the Alabama Optometric Association in securing passage of legislation, the violation of which is the basis of charges brought herein, is illustrated in the minutes of the State Board of Optometry attached as an exhibit to the deposition of Dr. Willard Smith's testimony. A cursory examination of those minutes from August 20, 1965 to the present are shown in the Record now on file and shown in the index (App. H) beginning on page 4 of Plaintiffs' Brief which starts at page 548)."

An examination of the excerpts from these minutes clearly shows that any discussion between themselves and their legal counsel had to do with the status of the lawsuit (pending over a 5-year period from filing to trial) and particularly the one against the plaintiffs herein and the corporate employer, Lee Optical Company of Alabama, Inc., after the defendant optometrists had gone out on demurrer. In every instance quoted from the minutes the discussion involved litigation pending and one instance where the State Board accepted the Association's recommendation as to employment of Board counsel. In only one other instance in the quoted minutes was any reference

made to charges presented to the Board and this was on another optometrist who is not a party to this suit and as reflected by the minutes, the Board merely instructed its attorney to proceed against the individual optometrist. There is nothing here which indicates bias, prejudice or any disqualifications of the Board to hear the pending charges.

Again, quoting from 97 A.L.R.2d, page 1219, in the case of the *Board of Medical Examiners* v. *Stewart* (1954), 102 A.2d 248 (Md.), the Court of Appeals expressed the opinion that there was error in declaring that the rehearing of the revocation proceedings should be held before a completely different board because all of the doctors on the first board were legally prejudiced by having already publicly committed themselves to an adverse interpretation in the void order of revocation. "While the high court acknowledged that due process requires that a fair and impartial hearing be given in cases of license revocation, it pointed out that disqualification will not be permitted to destroy the only tribunal with power in the premises, and then continued to its major holding that the general rule that a judge who presided at the trial of a case which is reversed and remanded for a new trial is not disqualified to retry the case, unless there is a contrary statutory provision, undoubtedly applies to members of administrative agencies because usually the procedure of such agencies is less strict and formal than that of the courts. On this reasoning, the court concluded that the lower court opinion of disqualification was not binding upon the board."

Again from page 1221, 97 A.L.R.2d, on the question of pecuniary interest on the part of the Board members, we find the following:

> Where a beauty school owner and operator whose students also performed services for the public challenged the appointment of two beauty shop operators as committee members to sit at a hearing on a complaint praying for the revocation or suspension of her occupational licenses, on the basis that they were her competitors and thus disqualified as having a pecuniary interest in the matter, the court in State ex rel. Beddall v Lonctot (1963) 62 Wash 2d 845, 384 P2d 877, 97 ALR2d 1201, found no defiance of due process where the legislature, acting within its permissible discretion, had decided that qualified practitioners of the same calling are competent to be hearing examiners in a revocation proceeding of other members. In refusing to single out one group within the calling as disqualified, the court noted that the pecuniary interest of the appointed shop owners was speculative and indirect, and that, in any event, having one competitive group within the calling dominate a licensing committee was not in itself a violation of due process.

In the few cases within the scope of this annotation where the question of equal protection has been discussed, the courts have decided on the basis of whether or not there was sufficient specific evidence present to support the charge of bias. Defendants state as a positive fact there is no such evidence in this case and further by Stipulation No. 11 the Board members say they will render a fair and impartial decision if permitted to hear these charges. 97 A.L.R.2d 1222.

The "Rule of Necessity" is held to apply in some instances and would certainly be applicable in this case since there is no statutory provision for reappointing another state board in the event the present board is not permitted to hear these charges. Beginning on page 1222, 97 A.L.R.2d, we find the following:

"There is an exception, based upon necessity, to the rule of disqualification of an administrative officer, to the effect that disqualification will not be permitted to destroy the only tribunal with power to act, or to prevent an otherwise disqualified officer from acting if his failure to act would result in a failure of justice. This exception has been applied in several cases involving license revocation or suspension proceedings wherein a member of the hearing body, who was also a member of the licensee's profession or occupation, was alleged to have been disqualified by bias or interest.

"United States.—Brinkley v Hassig (1936, CA10 Kan) 83 F2d 351.

"Arkansas.—Measles v Owens (1932) 185 Ark 106, 46 SW2d 40.

"Indiana.—Stone v Fritts (1907) 169 Ind 361, 82 NE 792, 15 LRA NS 1147.

"Maryland.—Board of Medical Examiners v Steward (1954) 203 Md 574, 102 A2d 248, supra § 3[d].

"Montana.—State ex rel. Yuhas v Board of Medical Examiners (1959) 135 Mont 381, 339 P2d 981."

Further supporting the rule of necessity, Lee Optical Company of Alabama, Inc., the employer of the plaintiffs herein at the time these charges were filed, advertised extensively throughout the State of Alabama that their one

low price included "a scientific eye examination" and other similar phrases so it would have been impossible for the State Board members to not have some general knowledge of the claims and advertising of the employer of the plaintiffs herein who continued to conduct eye examinations and condoned this advertising for almost three months, up until the time these charges were filed, when the advertisements were changed some but as held by the Circuit Judge in the Lee Optical trial in Circuit Court at Montgomery, in his decree, "the advertising was not thereafter changed to any great extent." In this case, the statute provides the State Board as the only tribunal with the power to revoke an optometrist's license and thus, the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises must be applied. In the case of *Brinkley* v. *Hassig* (1936), C.A. 10, Kan., 83 F.2d 351, the Court emphasized that absent such provisions for substitution of personnel or tribunal, then

> "The law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal. The Court concluded by adopting the language of the trial court: 'The members of the board were not disqualified because they knew of [the plaintiff's] methods prior to the hearing and condemned them. [His] methods were so notorious that ignorance of them by members of the board was an impossibility and such knowledge compelled condemnation.' "

5.

Whether the court erred in finding the plaintiffs had been harassed by defendants in their irreparable damage on the evidence before it.

Defendants urge that there has been absolutely no evidence of harassment of the plaintiffs as alleged in their complaint. Plaintiffs argued that they had been in litigation with the State Board in three cases prior to the filing of the Lee Optical case and the plaintiffs as their employer. Two of these suits involve Board rules and one involved a city ordinance of Bessemer, Alabama, and it was filed by Busch Jewelry Company. Neither the State Board nor the plaintiffs were involved in any way in this suit. The first case was *Alabama State Board of Optometry* v. *Busch Jewelry Company,* 261 Ala. 479, 75 So.2d 121 (October 7, 1954). The second case was *Busch Jewelry Company* v. *City of Bessemer,* 269 Ala. 180, 112 So.2d 344 (May 21, 1959), and the third case was filed against the State Board attacking regulations that had been adopted by the State Board, and this Dr. McCrory is one and the same as the Dr McCrory shown as a plaintiff herein and was an employee of Lee Optical. This is the case of *William B. McCrory* v. *William C. Wood, et al.,* members of the State Board of Optometry and Alabama State Board of Optometry, decided by the Supreme Court of Alabama, on January 21, 1965, and reported in 171 So.2d 341. This decision was rendered on January 21, 1965, some ten months prior to the filing of the charges involved herein. Certainly there was no harassment of the plaintiffs or anyone indicated by these suits and the record of trial of the case now before this Honorable Court (Stipu-

lation of Facts, Appendix K), shows no acts of harassment against them or acts of disqualification on the part of the State Board members. As a matter of fact, paragraph 11 of the stipulation states that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against the plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

The defendants therefore urge that the plaintiffs have failed to support their burden of proof in support of their charges of harassment, bias and prejudice on the part of the State Board members. The court erred in holding that since the individual members of the State Board of Optometry are substantially the same individuals who signed affidavits in 1965, stating or supporting proceedings charging that the plaintiffs had committed the violations charged in the proceeding, and conviction of the offenses charged and suspension of licenses are but predetermined formalities with no element of a fair trial. The undisputed testimony is that Dr. Thomas Gibson, member of the State Board, is the only one who signed anything and that was the verification of the bill of complaint against Lee Optical Company of Alabama, Inc., and the plaintiffs as employed optometrists and it was error to hold that conviction and suspension of licenses was but predetermined formalities with no element of a fair trial.

6.

Whether the court erred in assuming from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiffs.

A proceeding such as this could never reach all the facts and issues because they would be limited to a relatively small part of the overall picture. Actually this proceeding puts the members of the State Board of Optometry on trial for alleged bias, prejudice and pecuniary gain and leaves out the major issue of whether the plaintiffs have violated the optometry law and should be answerable to the only tribunal created by law and qualified to pass on the evidence presented to it by both sides. A reading of the decree in the *State Board of Optometry* v. *Lee Optical* case in Circuit Court at Montgomery will point up many of the questions of fact that both sides could never agree and stipulate on. This Lee case is now pending on appeal before the Alabama Supreme Court. The trial judge made his findings on the conflicting evidence before him in the state court Lee trial. One of the many instances of this would be on the steps necessary to make a thorough examination. The order and opinion of the three-judge tribunal in the lower court was based on the facts that the respective parties could agree on but which are obviously only a few of the controversial questions as reflected in the state court Lee decision. Notwithstanding this, the trial court found from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiff optometrists. The court erred in assuming as it did throughout its opinion

that as a result of any hearing before the State Board of Optometry their decision would be one of revocation of license. From a study of the reported cases herein and elsewhere, it is obvious that revocation of license is a penalty seldom meted out by a licensing board in any of the licensed professional groups. Usually there is a suspension for a reasonably short time and this is often followed by probation. It has been stated many times by the attorneys for the State Board of Optometry that they had no desire to run these plaintiff optometrists or any optometrists simularly situated out of Alabama because they are needed in Alabama in their own professional practices serving the needs of the people in the community where they practice with their allegiance running directly to their patient and no one else. This need is demonstrated by the fact that in 1969 a school of optometry was located in the medical complex in Birmingham, Alabama, and it now has second-year students in this optometry school (Stipulation 14). The *Bracken Jewelry* case, *supra*, not only holds optometry to be a profession in Alabama but also points out the obligation of an optometrist or any other professional man is the welfare of his patient and not the corporate employer or lessor whose primary interest is his search for profits in the marketplace (*Sears* v. *Mississippi* case, *supra*) so a professional man cannot properly and lawfully serve two masters—the corporate entity and his patient.

If this Honorable Court sustains the lower court in this matter, and the injunction against the Alabama State Board of Optometry and their successors is upheld, prohibiting them from hearing the charges against the plaintiffs now pending against them, then these optometrists

would be free to remain where they are, or go into some other similar type operation in Alabama and the State Board of Optometry would be unable to cope with this matter because not only the defendant members of the Optometry Board are enjoined but also their successors in office and since this is the only tribunal created by law in Alabama to hear such charges when filed before it, there could never be a hearing on such charges before the State Board.

If on the other hand, this Honorable Court directs a reversal and dismissal of the trial tribunal, the plaintiffs are afforded an adequate remedy in Alabama because they can test the qualifications of the State Board members by a mandamus proceeding in the state court where there would be ample opportunity for the plaintiffs to present their claims of disqualification and the individual board members would be given an opportunity to testify in court on the matters presented and so long as a quorum of three Board members are left, a hearing on the charges could be held.

In the event of a reversal and dismissal in this case and the plaintiff optometrists passed up their right to file a mandamus proceeding and stood trial before the State Board where, by law, they would be given ample opportunity to cross-examine witnesses, be represented by counsel and produce witnesses on their own behalf and if the State Board reached a decision that was not objectionable to the individual optometrists, then there would be no reason to carry the matter further. If such ruling was objectionable they have the right of appeal all the way up to the Alabama Supreme Court as pointed out heretofore in

this brief. Any preserved federal question could be reviewed by this Honorable Court on application for certiorari.

The situation in this case is quite unusual in that this federal court suit was filed before there had been a hearing before the State Board. Almost all of the other reported cases involved appeal procedures either in state court or the federal courts after the record was made before the State Board and a decision reached and announced by it. This has been described as a drastic procedure in other civil and criminal matters as we will point out later with citations in this statement. We, therefore, urge with all the power at our command that this Honorable Court give the utmost consideration to the impact of the opinion heretofore rendered by the trial court not only upon optometry in Alabama but its impact on all licensing boards throughout the country. There are many similarly appointed Boards serving just as this State Board and this would upset the entire system of professional licensure now written into the laws of practically every state.

7.

Whether the court erred in overruling defendant's motion to dismiss this action.

We urge that the trial court committed error in overruling defendants' motion to dismiss this action. This motion was included and brought along at each stage of the pleadings in this case. We feel that Sections 192 and 206, Title 46, of the optometry law, Code of Alabama, are constitutional, having been so held in *McCrory* v. *Woods*, *supra*, by the Alabama Supreme Court and in keeping with the additional cases cited under Questions Presented, No. 1 and No. 2, *supra*.

This involves a situation where charges that were pending against each of the plaintiffs before the defendant State Board were scheduled for hearing and before any hearings were held on these charges, this suit was filed resulting in the injunction herein against the State Board and their successors in office from conducting hearings on any of these charges. This presents a different situation to most of the reported cases where suit is filed in federal court after the hearing has been held and a decision rendered by the State Board. On the basis of the stipulation herein and the pretrial order, we do not believe there are sufficient facts shown to either disqualify the State Board for bias, prejudice, pecuniary interest or harassment as charged.

In *Miller* v. *Aldridge*, 103 So. 835, the Alabama Supreme Court held the proper remedy to be by mandamus to compel members of a State Board of Accountancy to recuse themselves as disqualified to pass on charges for

revocation of a certificate to practice, p. 838, and in doing so quoted from *Lehmann*, 263 U.S. 394, 44 S.Ct. 128, 68 L.Ed. 354, as well as the cases cited on page 839: *Ex parte State Bar Association*, 82 Ala. 113, 8 So. 768; *McConnell* v. *Goodwyn*, 189 Ala. 390, 66 So. 675, Ann.Cas. 1917A, 839. Since the order of this Court disqualified not only the present members of the State Board of Optometry but their successors in office as well, this destroys the only tribunal established by law in Alabama to hear the charges and thus it becomes imperative that the plaintiffs be required to pursue the proper remedy of mandamus in Alabama where a full hearing could be held in court on the question of disqualification with the right of appeal available to either side. If the court in such a proceeding found the board members disqualified, then an appeal could be made to the Alabama Supreme Court just as it was in this *Miller* v. *Aldridge* case. In the case of *Beam* v. *Fulwiler*, 456 P.2d 325, the Supreme Court of Washington held that where a hearing board is disqualified and there is no provision for another tribunal to hear the matter, the court is possessed of inherent jurisdiction to hear and determine the controversy on its merits. It is unthinkable that the trial court in this case should be required to hear the charges against each of the plaintiffs after having destroyed the only tribunal provided by law in Alabama to hear the charges, so this adds impetus to the defendants' contention that this case should be dismissed and let the matter be decided in Alabama either by mandamus in the courts or by hearing before the State Board.

The defendants urge there has been no mixing of functions in this matter of sufficient importance to dis-

qualify the entire membership of the State Board. By Stipulation No. 11, the individual members of the State Board state they would each testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them. There has been no activity shown on the part of the members of the State Board such as that in the *Miller* v. *Aldridge* case, *supra*. The case of *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp. 1259, does not apply to this case because the charges were prepared and filed by the Alabama Optometric Association with the State Board and there was no mixing of functions that would disqualify the members of the State Board and there has been no hearing on the charges.

From the above, it is clear that we have in this case charges pending before the State Board which have been held in other cases to be quasi-criminal or quasi-judicial. They are definitely administrative proceedings as held in *Engleman* v. *Cahn*, 425 F.2d 954, and the trial court cited this case to show that the Anti Injunction Act, 28 U.S.C. 2283, does not apply to administrative proceedings.

In *Samuels* v. *MacKell*, 91 Sup.Ct. 764 (1971), the appellants charge that trial of the indictments against them in state courts would harass them, and cause them to suffer irreparable damages, and they therefore prayed that the State Board should be enjoined from further proceedings. In the alternative, appellants asked the Court to enter a declaratory judgment to the effect that the challenged state laws were unconstitutional and void for the above and additional grounds set out in the opinion. The three-judge

Court hearing this matter held the New York criminal anarchy law was constitutional as it had been construed by the New York courts and held the complaint should therefore be dismissed. 288 F.Sup. 348 (D.C.S.D. N.Y., 1968).

It would appear that an essential element in the *Samuels* case and others is that there must be allegations and proof that a trial of indictments (charges before the State Board here) in state courts would harass them, and cause them to suffer irrepairable damages and cited as follows from page 766 of the *Samuels* case:

> "In No. 2, Younger v. Harris, 400 U.S. —, 91 S.Ct. 746, 27 L.Ed.2d —, we today decided on facts very similar to the facts in these cases that a United States District Court could not issue an injunction to stay proceedings pending in a state criminal court at the time the federal suit was begun. This was because it did not appear from the record that the plaintiffs would suffer immediate irreparable damages in accord with the rule set out in Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), and many other cases. Since in the present case there is likewise no sufficient showing in the record that the plaintiffs have suffered or would suffer irreparable damages, our decision in the *Younger* case is dispositive of the prayers for injunctions here. * * *"

In the pending case the constitutionality of Sections 192 and 206 of the Alabama optometry law are alleged to be unconstitutional, but as in *Samuels*, the Alabama Supreme Court had construed these two sections to be constitutional in *McCrory v. Wood, supra.* Additionally, the plaintiffs charged the trial of the charges before the State Board would harass them and cause them to suffer irrepa-

rable damages and prayed for injunctive relief against the State Board, its present members and successors in office, and we would urge, in the present case, that no valid proof of harassment, irreparable damage and bad faith on the part of the State Board has been proved and if the mere trial of the charges before the State Board would constitute harassment and irreparable damage, then no such charges could ever be tried before any administrative body. We feel the allegations of harassment and irreparable damages alleged by plaintiffs herein, are without merit.

There is the later case of *Henry* v. *First National Bank of Clarksdale*, 444 F.2d 1300 (decided June 23, 1971), which we feel further supports the motion of the defendants to dismiss, first on the grounds that the Alabama Supreme Court has held Sections 191 and 206 of the Alabama Optometry law to be constitutional, *McCrory* v. *Wood, supra*, and, secondly, the mere filing of the charges herein does not in itself constitute harassment or irreparable damage and, as contended by defendants herein, there has not been a sufficient showing on the part of the plaintiffs to show bad faith on the part of the State Board and its members such as would constitute harassment and irreparable damage. Thirdly, in addition to their right of a hearing before the State Board on the charges pending in Alabama, the proper procedure to challenge the qualifications of such Board members is well established as being that of mandamus wherein there could be a full hearing and both sides presented to a court and a decision reached on the alleged disqualification of State Board members. *Miller* v. *Aldridge, supra.*

In such a mandamus hearing, the alleged pecuniary interest of the State Board members could be determined. Such a pecuniary interest would have to be substantial to constitute disqualifications as held in the case of *In re Heirich* (1956), 10 Ill.2d 357, 140 N.S.2d 825, 67 A.L.R.2d 827, *cert. den.* 355 U.S. 805, 2 L.Ed.2d 49, 78 S.Ct. 22, and found in 97 A.L.R.2d, page 1216. This was a disbarment proceedings in which one of the commissioners should have disqualified himself because of interest, since he was a partner in a law firm that represented several members of a railroad association which had financed and directed the prosecution of the charges against the accused. Citing *New Jersey State Board of Optometry* v. *Nemitz*, 21 N.J. Super. 18, 90 A.2d 740, *supra*, § 3(B).

There are numerous cases holding that the pecuniary interest was found too remote to be disqualifying. A writ of mandamus was sought in *Ex parte State Bar Association*, paragraph 1890, 92 Ala. 113, 8 So. 768, 12 L.R.A. 134, to compel a circuit judge to proceed in a disbarment action, where the judge had disqualified himself on the basis that he, as a dues paying member of the incorporated bar association bringing the disbarment action, had a pecuniary interest in the outcome in view of the liability of the bar association for costs of the proceedings should the determination be adverse to the association. Pointing out that the bar association was not a capitalized commercial or financial concern, its members were not stockholders, and its purposes were social, ethical and public, the Supreme Court granted the writ and held that even if the association owned property in which the members would share upon its dissolution, the interest was too remote and specu-

lative to disqualify a member from sitting as a judge or juror in a case to which the bar association was a party. This case supports our contention that the proper remedy to test the qualification of a judge or board member is by mandamus which has not been done in this case.

Reference is made to *State ex rel. Beddall* v. *Lonctot* (1963), 62 Wash.2d 845, 384 P.2d 877, 97 A.L.R.2d 1201. Under Questions Presented Number 4, we quoted from several cases in the annotation to this *Beddall* v. *Lonctot* case in support of our Question Number 4 and by reference will be adopted in support of our motion to dismiss on the question of pecuniary interest.

The plaintiffs urge that the Lee Optical Company in 1969 sold 75,000 pairs of glasses in Alabama. This is Stipulation 13. The trial court mentions this in its opinion. We cannot lose sight of the fact that in the Lee Optical case in state court, granting an injunction against Lee Optical, paragraph 8 of the trial court decree specifically provides that it will not be construed to enjoin Lee Optical Company of Alabama, Inc., from pursuing the trade or business of a dispensing optician, so long as it does so in a lawful manner and so long as it does not attempt to unlawfully practice optometry through its agents, servants or employees, or through any other arrangement, either directly or indirectly, anywhere in the State of Alabama in any establishment owned or controlled by or in any manner connected with it. From this it can readily be seen that Lee Optical can continue to do business as a dispensing optician and they may or may not sell the same number of pairs of glasses in the future as they did in 1969. It was the opinion

of the trial court, with reference to the 75,000 pairs of eyeglasses sold in one year, "presumably if plaintiffs' activities are suspended, defendants would share in this annual business." According to this reasoning, no licensing board could escape the allegation of pecuniary interests, be he an association member or not, on the basis that if the board voted to disbar, revoke or cancel the license of the person charged, then the board members would share in the annual practice or business of the licensed professional charged. This reasoning and presumption is untenable and we know for a fact that the optical department of Sears Roebuck and Company in Jackson, Mississippi, which was involved in the *Mississippi Sears* v. *State Board* case, *supra*, is still engaged in the sale of glasses as an optical dispensary and has been so continuously engaged since the decision in the *Mississippi Sears* case, *supra*, for almost twenty years. Certainly this optical dispensary department in Sears would not have continued through the years if it was not profitable without having an optometrist on the premises or available to examine eyes, which was prohibited by the injunction in the *Sears Mississippi* case, *supra*. For the same reason, it is contemplated and by the court decree permitted, that Lee Optical Company of Alabama, Inc., will continue its business in Alabama as an optical dispensary but, as held in the Lee decree by the trial court, it is not in the best interest of the public welfare that optometrists or physicians be permitted to have any contractual agreement whereby they will accept customers from Lee Optical for the purpose of doing a refractive type examination to provide the customer with a prescription and return him to Lee Optical to purchase glasses.

The case of *Eugene T. Ventresca, O.D.* v. *Ohio State Board of Optometry*, No. 71-2, Court of Appeals of Franklin County, Ohio, decided April 13, 1971 (not yet reported), reversed and the injunction dissolved and case dismissed, proves helpful in this matter. The facts are similar in that Dr. Ventresca was sent a notice by the State Board referring to certain allegations against him which would lead to a hearing before the State Board. Dr. Ventresca promptly filed an injunction suit to enjoin the board from hearing the matter. When the case reached the Ohio Court of Appeals, it had the following to say:

"* * * No one can claim legislation to be unconstitutional until he has been hurt by its operation. In this case, at this point, the plaintiff, Ventresca, has not only not been hurt by the challenged statute, he merely anticipates that he will be. There has been no decision rendered by which he can claim to be hurt since he has, up until now, forestalled a decision. (See such cases as *State, ex rel. Lieux* v. *Village of Westlake* [1951], 154 Ohio St. 412, *Curtiss* v. *City of Cleveland* [1959], 170 Ohio St. 127, *Greenhills Home Owners Corp.* v. *Village of Greenhills* [1966], 5 Ohio St. 2d 207, and others which discuss these concepts.)"

The Court further said:

* * * * * *

"Any decision of the board is subject to appeal under R. C. 119.01 through 119.13. An action in equitable injunction will not operate to forestall a hearing by the board when a resulting decision, if adverse as it would appear the plaintiff anticipates it will be, may be regularly appealed.

"When regulations of the board are questioned, the Supreme Court has made it abundantly clear that it

will not aid in making or revising the rules of boards but will only decide whether those rules are reasonable and lawful as applied to the facts of a justiciable case. In *Fortner* v. *Thomas* (1970), 22 Ohio St. 2d 13, the Supreme Court says that it will not consider the lawfulness of an administrative regulation, or a legislative act, in a vacuum, but only when an affected person is involved.

"It is submitted that the equitable procedure here invoked required the trial court to pass upon the lawfulness of a regulation in a vacuum, that is, before anyone was hurt; in fact, before even the board had acted upon the complaints, 'allegations,' before it.

"The plaintiff is not entitled to an injunction. There is available an adequate remedy at law by way of appeal from any administrative order which affects him adversely.

"The appeal of the appellant board is well taken.

"The judgment of the trial court is reversed and the injunction dissolved.

"Rendering the judgment the trial court should have rendered, the complaint of the plaintiff is dismissed at his costs.

"WHITESIDE and REILLY, JJ., concur."

On the question of harassment, we find, in the case of *Texas State Board of Examiners in Optometry* v. *Carp*, 343 S.W.2d 242, as follows:

"[4] Respondent alleged, among other things, that the members of the Board, who are practicing optometrists, were acting maliciously in furtherance of a conspiracy to harass and annoy him and destroy his practice. He directs our attention to the evidence show-

ing that on one occasion some fourteen of respondent's employees were requested to attend a meeting in Dallas to determine that one member of the Board is a co-owner of respondent's largest competitor, and several of respondent's employees have left him to accept employment with the latter organization. In some instances the discussions which brought this about occurred shortly before or after a meeting of the Board at which the employee in question had been notified to appear. These circumstances do not warrant the conclusion that there is a conspiracy, or that the Board has made any improper use of its powers, to annoy, harass or damage respondent.

* * * * * *

"[6] If any charge is filed against respondent because of his noncompliance with the Corporate Practice Rule, the ultimate question to be decided is whether he has violated Article 4563(i). Noncompliance with the rule merely makes a prima facie case, and respondent can defeat the complaint by showing that he does not place his license at the disposal or in the service of an unlicensed person. Whether respondent will be able to make that showing is a matter of conjecture, and any injury to him resulting from the Board's interpretation of the rules is equally a matter of conjecture. In the event the Board finds that he has violated the statute, it may but is not required to revoke his license. If his license is revoked, the statute gives him the right of appeal to the district court, and the court may then stay or enjoin the decision of the Board when such action appears to be necessary for the protection of his rights.

* * * * * *

"As pointed out in Turner v. Bennett, Tex.Civ.App., 108 S.W.2d 967, 971 (no writ), 'there is a vast difference in a court reviewing a final order of an adminis-

trative board and in prohibiting such board from making any order or from prosecuting an inquiry to ascertain whether any order will be necessary. That courts are without authority to thus interfere with commissions and administrative departments of the government in the lawful exercise of duties and functions committed to them by law is well settled.' See also State Board of Barber Examiners v. Comer, Tex. Civ.App., 109 S.W.2d 1012 (no writ). Various reasons are assigned by the courts as grounds for refusing to grant relief against threatened or pending administrative action. See 42 Am.Jur. Public Administrative Law, p. 574, § 195 et seq. A board or commission created by the Legislature with authority and responsibility for determining in the first instance whether certain action shall be taken is not subject to restraint by the courts whenever it appears that an erroneous conclusion has been reached on some preliminary or procedural question. Any other rule would afford an opportunity for constant delays in the course of administrative proceedings, and there is no real need for equitable relief in the ordinary case until a final administrative determination has been made.

"The temporary injunction issued in this case prevents the Board from exercising in certain instances the powers vested in it by statute. Proceedings under Article 4563 are begun by filing charges in writing and under oath, and the charges may be made by any person. Article 4556 gives the Board power to issue subpoenas, administer oaths, take testimony, and institute actions in its own name to enjoin the violation of any provision of the Act. If a complaint is presented charging that a licensee has been guilty of any misconduct constituting grounds of revocation, the Board is authorized by Article 4563 to accept and file the same, issue notices, conduct a hearing, and determine the charges upon their merits. In performing these func-

tions, it must hear evidence, ascertain the facts, interpret the statutes and its own rules, apply the same to the facts, and determine whether to cancel, revoke or suspend the license of the person charged. No contention is made that these statutes are invalid, and it is our opinion that the Board is entitled to and should exercise the powers which they confer and discharge its lawful responsibilities without interference from a court of equity.

"The judgments of the courts below are reversed and the temporary injunction is dissolved."

On the question of Board members being members of the association filing the charges as grounds for disqualification, we find in *Michon* v. *Louisiana State Board of Optometry Examiners*, 121 So.2d 567, the following:

"[1] The first assignment of error contends plaintiff did not receive a fair hearing before the Board which conducted the hearing. His position is that Drs. Hewitt and Roberts should have recused themselves from any participation in the hearing. The only reason advanced for this argument is that both of these members of the Board were also members of the Southwest Louisiana Optometric Society, which organization was responsible for the charges filed against him. It was stipulated in the record that neither Dr. Hewitt nor Dr. Roberts was present at the meeting of the Society when action was taken directing that the charges be filed. Notwithstanding this fact, it is argued without supporting evidence, that these members of the Society were aware of the charges and for this reason alone they were disqualified to sit in judgment upon the rights of plaintiff. A careful examination of the record fails to reveal any indication that either of the Board members possessed any preconceived resolution of the charges

against appellant. Furthermore, it was not essential that such charges be filed by a professional society, but they may be presented to the Board by an individual. An additional reason plaintiff cannot claim prejudice on this score is that the charges so made and considered by the Board may be reviewed by the courts, as is being done in this instance. The defense so made is without merit."

From the above cited cases in this statement, we have urged that it is abundantly clear that the plaintiffs herein should pursue their remedy either by a hearing before the State Board or some appropriate action in the state courts of Alabama and that in this case, the order of the trial court granting an injunction and hearing the case on its merits should be reversed and the case dismissed at the cost of the plaintiffs.

The Order on Pre-Trial Hearing is shown as Appendix L.

The Notice of Appeal to the Supreme Court of the United States is shown as Appendix M.

CONCLUSION

It is submitted that the decision of the three-judge district court is not supported by law and the facts in this case as shown by decisions of this Court, other federal courts and state courts. The decision of the trial judges decides important issues of federal constitutional law which should be considered by this Honorable Court. The defendant State Board of Optometry earnestly believes the questions presented by this appeal are substantial and that

they involve the public health and welfare and are of public importance.

Respectfully submitted,

J. G. L. MARSTON, III
DONALD GEORGE VALESKA, II

BY_____
Assistant Attorneys General
250 Administrative Building
64 North Union Building
Montgomery, Alabama

WILLIAM BAXLEY
Attorney General of Alabama
State Capitol
Montgomery, Alabama

RICHARD A. BILLUPS, JR.,
P. O. Box 1056
Jackson, Mississippi 39205

Attorneys for Appellees

Date: November _____, 1971

CERTIFICATE OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of November, 1971, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on all parties required to be served, by depositing a copy of such Jurisdictional Statement in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
   P. O. Box 116
   Montgomery, Alabama 36101

2. On Honorable Douglas E. Bergman
   Mercantile Bank Building
   Dallas, Texas 75201

_____
Richard A. Billups, Jr.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FILED
Sep. 3, 1971
JANE P. GORDON, Clerk
By _____
Deputy Clerk

L. M. BERRYHILL, ET AL,)
)
Plaintiffs,)
) CIVIL ACTION
VS.) NO. 3339-N
)
THOMAS S. GIBSON, ET AL,)
)
Defendants.)

ORDER

In accordance with the opinion entered this date, it is the ORDER and JUDGMENT of this Court that:

1. The Motion to Dismiss of the Defendants as amended be, and the same is hereby, denied;

2. Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr and Willard Smith, individually and as members of the State Board of Optometry of the State of Alabama and their successors in office as such are hereby restrained and enjoined from conducting a hearing on the charges heretofore preferred against the Plaintiffs and from revoking the licenses of the Plaintiffs to practice optometry within the State of Alabama;

3. Other relief prayed for by the Plaintiffs in this proceeding be, and the same is hereby, denied;

4. The Cross-Claim of the Defendants be, and the same is hereby, dismissed without prejudice.

[APPENDIX]

DONE this 3rd day of September, 1971.

s/ Robert T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FILED
Sep. 3, 1971
JANE P. GORDON, Clerk
By _____
Deputy Clerk

L. M. BERRYHILL, ET AL,)
)
Plaintiffs,)
) CIVIL ACTION
VS.) NO. 3339-N
)
THOMAS S. GIBSON, ET AL,)
)
Defendants.)

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges

OPINION

VARNER, District Judge:

Plaintiffs in the above cause are licensed optometrists under the state law, Code of Alabama, Title 46, §§190, et seq. In October, 1965, each of the Plaintiffs was employed by Lee Optical Company of Alabama, Inc., or was working on the premises of said corporation in fitting glasses and

doing related optometry work in association with the sale by Lee Optical Company, Inc., of glasses to the public. In October, 1965, Plaintiffs were charged by the President of the Alabama Optometric Association with having violated several sections of the Alabama optometry law in a proceeding to be decided by the State Board of Optometry, with the result of suspending or not suspending the licenses of each of the Plaintiffs. The matter of license suspension has been pending since 1965 but has not been actively prosecuted until Plaintiffs were notified in the spring of 1971 by the Board that the matters pending against them would be heard the latter part of May, 1971.

Plaintiffs filed this proceeding requesting a three-judge court to determine the constitutionality of the statute pursuant to which the Alabama Optometric Association seeks suspension of the licenses of the Plaintiffs. Plaintiffs seek an injunction against prosecution of said state proceedings. To this end, a three-judge court has been empaneled. By Cross-Claim, Defendants seek to have this Court revoke Plaintiffs' licenses to practice optometry. By agreement, the administrative prosecution has been suspended pending this proceeding.

Plaintiffs insist that suspension of their licenses would deprive them of the right to seek remuneration from practicing their profession and, therefore, deprive them of their property without due process of law. More specifically, they say the following:

1. That since the individual members of the State Board of Optometry are substantially the same individuals who signed affidavits in 1965 stating, or supporting proceedings charging, that the Defendants (Plaintiffs here) had committed the violations charged in the proceedings, conviction of the offenses charged and suspension of licenses are but predetermined formalities with no element of a fair trial;

2. That the statutes under which Plaintiffs are being prosecuted, as they pertain to the Plaintiffs' rights to appeal from any adverse decision, are unconstitutional, particularly, in providing no method of superseding the suspension of licenses in question pending court review; and

3. That the State Board of Optometry is illegally constituted in that only about one-half of the practicing optometrists of the state may participate in the government of their profession.

The initial question in this case is whether this is such a situation as will require or permit federal intervention to restrain actions of a state court or administrative body. The Supreme Court in several recent cases has indicated federal reluctance to intervene, even to secure federal constitutional rights, in state judicial or administrative proceedings unless particular harassment or irreparable injury will result from the state proceeding. The Court in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), held that there is no irreparable injury if the threat to the plaintiff's federally-protected rights can be eliminated by defense of a single criminal prosecution, that "our federalism" ordinarily precludes an injunction against pending state criminal proceedings, and that the federal courts ordinarily should not intervene by injunction even to protect federally-protected rights without any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief, 91 S.Ct. at 755. While dicta in *Younger* may indicate that the rule of that case does not apply in civil cases, no distinction is made between civil and criminal cases by Congress in the anti-injunction act, 28 U.S.C. 2283. However, it has been held that this statute is not applicable to state administrative proceedings, *Engelman* v. *Cahn*, 425 F.2d 954. The case of *Samuels* v. *Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), indicated that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by

federal district courts in determining whether to issue a declaratory judgment, a[nd * * * where an injunction would be impermissible under these principles, declaratory relief should ordinarily be d[enied as well." 91 S.Ct. 25, 768. In the case of *Dyson* v. *S[tein*, 401 U.S. 200, 91 S.Ct., 769, 27 L.Ed.2d 781 (1971), a [district court's injunctive relief to a person charged under [the Texas obscenity statute, on the basis of the district cou[rt's conclusion that the statute was unconstitutional, was r[eversed and remanded since injunctive relief was proper [only where irreparable injury was threatened and there w[as no irreparable injury found by the district court. In *Pe[rez* v. *Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (19[71), the Supreme Court held it was improper to interfere [with enforcement of a Louisiana obscenity statute by s[uppressing evidence held to have been improperly seized, [since the plaintiff could present his challenge to the seizur[e in the state prosecution. In *Byrne* v. *Karalexis*, 401 U.S. [216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971), the Supreme C[ourt reversed a Massachusetts District Court enjoining en[forcement of the state statute at the instance of the defend[ant who was under state court indictment for violation o[f the statute and remanded the case in the light of *Younger* [and *Samuels* since there had been no finding that the th[reat to the plaintiff's constitutional rights was one that cou[ld not be eliminated by his defense against a single crimin[al prosecution. On the other hand, federal courts will enj[oin state proceedings, even in criminal cases, to protect f[ederal rights where irreparable injury is threatened or t[o prevent continued harassment, *Ex Parte Young*, 209 U.S. [123, 28 S.Ct. 441, 52 L.Ed. 714; *Dombroski* v. *Pfister*, 380 U[.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Pleadings and unc[ontradicted evidence in the instant case indicate that Plai[ntiffs have been actively practicing their professions since [prior to 1965 and that the cases against them have bee[n pending since that time, that the individuals who will ac[t as judges of their cases are largely the same individuals w[ho in 1965 supported prosecution of

Plaintiffs for the very acts for which they are now being charged; that the statutes under which they are being prosecuted provide no precautions against the Board's acting as investigator, prosecutor, and judge all in the same case and provide for no supersedeas of suspension of license, pending an appeal; and that the organization charged with judging the ethics of Petitioners and with possibly suspending their licenses, is the State Board of Optometry, a board selected from the state's 100 private practitioners of optometry who must govern the state's 192 optometrists, of whom about 92 work for some other person or entity.

The Alabama Optometric Association is a corporation formed by, and whose membership is limited to, private practitioners of the profession of optometry whose services are available to the public. The State Board of Optometry is an unincorporated Board created pursuant to Code of Alabama, Title 46, §192, and is appointed by the Governor from members in good standing of the Alabama Optometric Association. In Alabama, approximately 100 practicing optometrists are in private practice of optometry and their services are available to the public while approximately 92 optometrists are employed by other persons or other entities. By virtue of the rules of the Association, the employed optometrists may not be members of the Association, and by virtue of said Section 192, no person other than members of the Association may serve on the State Board of Optometry. It follows, therefore, that no optometrist, employed by any other person or entity, may serve on the State Board of Optometry and that, therefore, 92 of the state's 192 practicing optometrists have no right to participate in the government of their own profession.

Code of Alabama, Title 46, §206, provides authority for suspension or revocation of the license to practice optometry within the State of Alabama by the State Board of Optometry for certain causes in addition to those causes heretofore excluded by the Supreme Court of Alabama in *McCrory* v. *Wood*, 277 Ala. 426, 171 So.2d 241.

The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. A basic element of justice in America is that the court must avoid, not only evil but, the appearance thereof. The Supreme Court of the United States in *Re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623, wrote the following:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749, 758, 47 S.Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11."

In the instant case, there is evidence that those who are to judge the matters of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs worked, issued over 75,000 eyeglasses in one year.

Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business. Plaintiffs argue that the suspension of licenses of the Plaintiffs is but a matter of form and that, when the same are suspended, no supersedeas being provided, the Plaintiffs will be deprived of an opportunity to practice their profession until relief can be secured from the courts of the State of Alabama.

Supersedeas is within the power of the court without statutory authority therefor. *Huett* v. *Nevins*, 50 So.2d 160, 255 Ala. 37; *Campbell* v. *Byers*, 60 So. 737, 6 Ala.App. 292. Appeal from a judgment, when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends the judgment without such a bond. *Ex Parte Cudd*, 195 Ala. 80, 70 So. 721; *Riley* v. *Wilkinson*, 25 So.2d 384, 247 Ala. 579. Note the evolution of the law associated therewith discussed at 4 Am.Jur.2d 839, Appeal and Error, §365.

Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have apparent personal interests in the matter in controversy. This invades the very core of due process of law.

Revocation of the license of a professional man to practice his profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the Plaintiffs. No method is provided under the state law to avoid this irreparable damage. There is no necessity for exhausting state administrative remedy unless that remedy would be adequate. *Kelly* v. *Board of Education*, 159 F.Supp. 272. It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. *Miller* v. *Aldridge*, 212 Ala. 660, 103 So. 835; *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp. 1259.

We turn now to the counterclaim of the Defendants. This matter was not called to the Court's attention at the pretrial hearing and no issue was formulated thereon in the pretrial order. That order limits the issues and controls the course of the action unless modified to prevent manifest injustice, Rule 16, Federal Rules of Civil Procedure. The counterclaim would be no more than a permissive counterclaim as distinguished from a compulsory counterclaim, *Big Cola Corp.* v. *World Bottling Co.*, 134 F.2d 718; *Weber* v. *Weber*, 44 F.R.D. 227; *Non-Ferrons Metal, Inc.* v. *Saramar Aluminum Co.*, 25 F.R.D. 102; *American Samec Corp.* v. *Florian*, 9 F.R.D. 718. We, therefore, conclude that no manifest injustice would result from failure to consider the counterclaim and that the same should be dismissed.

This 3rd day of September, 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

APPENDIX B

[CODE OF ALABAMA]

* * * * * * *

§ 206. (2889) License may be suspended or revoked.—A license issued to any person may be suspended for a definite period of time, or revoked by the state board of optometry for any of the following reasons; to-wit: Conviction of any offense involving moral turpitude, in which case, the record of conviction, or a certified copy thereof certified by the clerk of the court or by the judge in which court the conviction is had, shall be conclusive evidence of such conviction. For unprofessional conduct. "Unprofessional conduct" shall be defined to mean any conduct of a character likely to deceive or defraud the public, lending his license by any licensed optometrist to any person, the employment of "cappers", or "steerers" to obtain business, "splitting" or dividing a fee with any person or persons, the obtaining of any fee or compensation by fraud or misrepresentation, employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work, by use of any advertising, carrying the advertising of articles not connected with the profession, the employment of any drugs or medicines in his practice unless authorized to do so by the laws covering the practice of medicine of this state, or the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice. When a license or certificate has been obtained by fraud practiced on the board. When the holder of a license or certificate is suffering from a contagious or infectious disease. Gross incompetency. Intemperance in the use of intoxicating liquors or narcotics to such an extent as unfits the holder of the license for the proper practice of optometry. Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same,

and a copy of the charges, which must be made in writing, and verified by oath, together with a notice of the time and place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be effected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the person or persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of licenses as herein provided for, the holder may appeal to the circuit court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked resides. (Ib.)

APPENDIX C

[Old Section 210 Before Repeal]

§ 210. (2893) Store where glasses are sold; how department conducted.—Nothing in this chapter shall be so construed as to prevent any person, firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such a store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsovere nature done by said person, firm or corporation. (Ib.)

[Old Section 211 Before Amendment]

§ 211. (4387) False or misleading statements in advertisements or stores having optometry departments.—It shall be unlawful for any person, firm or corporation, engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. And it shall be unlawful for any individual, firm or corporation, engaged in the sale of goods, wares or merchandise who maintains or operates, or who allows to be maintained and operated in connection with said mercantile business an optometry department; or who rents or subleases to any person or persons for the purpose of engaging in the practice of optometry therein, any portion of or space in said store, premises or establishment in which such person, firm or corporation is engaged in said mercantile business, to publish, or circulate, or print or cause to be printed, by any means whatsoever, any advertisement or

notice of the optometry department maintained, operated, or conducted in said establishment or place of business, in which said advertisement or notice appear any untruthful, improbable, impossible, or misleading statement or statements, or anything calculated to mislead or deceive the public. (1919, p. 742; 1935, p. 896.)

* * * * * * *

§210: Repealed by Acts 1965, p. 324, §1, appvd. Aug. 4, 1965

[§211 as amended]

§211. (4387) False or misleading statements in advertisements or circulars.—It shall be unlawful for any person engaged in the practice of optometry in this state to print or cause to be printed, or circulate or cause to be circulated, or published, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. (1919, p. 742; 1935, p. 896; 1965, p. 304, § 2, appvd. Aug. 4, 1965.)

APPENDIX B

TO THE ALABAMA STATE BOARD OF OPTOMETRY
IN RE: DR. J. HARRY SPARKS

I, the undersigned, as President of the Alabama Optometric Association, allege and charge that Dr. J. Harry Sparks a registered optometrist in Alabama, is practicing in violation of the Alabama Optometry Law since August 4, 1965 when Governor George Wallace signed House Bill No. 205, at 11:59 A.M. which House Bill No. 205, among other things, repeals Section 210 of the Alabama Optometry Law as found in title Chapter 11, Sections 190 to 213 inclusive, 1940 Code of Alabama, in that he is operating through a company or corporation, to-wit: Lee Optical Company of Alabama, Inc., and is aiding, abetting and assisting said corporation to unlawfully practice optometry in Alabama by offering to make eye examinations and fit glasses and is receiving pay and financial emolument in return for so aiding, abetting, assisting and making it possible for said corpration to so unlawfully practice optometry in Birmingham (Ensley), Alabama. See exhibits 1, 2, 3 and 4 attached.

I further allege and charge that Dr. J. Harry Sparks is practicing optometry under a false or assumed name to-wit: Lee Optical Company of Alabama, Inc., in violation of Section 191 of the Alabama Optometry Law.

I further allege and charge that Dr. J. Harry Sparks is soliciting the sale of eyeglasses in violation of Section 203 of the Alabama Optometry Law through the advertising campaign as presently conducted on behalf of himself and Lee Optical Company of Alabama, Inc.

I further allege and charge that Dr. J. Harry Sparks is guilty of unprofessional conduct as defined by law in Section 206 of the Alabama Optometry Law in that he is lending his license to Lee Optical Company of Alabama, Inc., and is employing the Lee Optical Company of Alabama,

Inc. as cappers and steerers to obtain business and further that Dr. J. Harry Sparks is splitting or dividing his fee with Lee Optical Company of Alabama, Inc.

I further allege and charge that Dr. J. Harry Sparks received knowledge of the repeal of Section 210 of the Optometry Law by the passage of House Bill No. 205 shortly after August 4, 1965 by a letter from the Alabama Optometric Association and a letter from the Alabama State Board of Optometry, by certified mail, which they sent Dr. J. Harry Sparks advising of the repeal of Section 210 and enclosing a copy of House Bill No. 205 as signed by the Governor and urging his compliance with the Optometry Law as amended.

That because of his willful, continued and unlawful acts and conduct in thus aiding and abetting and assisting a corporation to-wit: Lee Optical Company of Alabama, Inc., to unlawfully practice optometry in Alabama without right to do so and because of the unlawful acts and unprofessional conduct as set out above the said Dr. J. Harry Sparks should have his license to practice optometry in the State of Alabama revoked after due notice and hearing before the State Board of Optometry which hearing is respectfully requested.

Dated this 23rd day of October, 1965

s/ Roy C. Adams
ROY C. ADAMS, O.D.

STATE OF ALABAMA
MONTGOMERY COUNTY

Before the undersigned, notary public, in and for said County and State personally appeared Dr. Roy C. Adams, President, Alabama Optometry Association, who after being duly sworn, deposed and said that the allegations contained in the foregoing charges are true and correct and

acknowledged that he signed the charges voluntarily this the 23 day of Oct., 1965.

s/ Thomas F. Parker
NOTARY PUBLIC

EXHIBIT NO. 1

Act No. 218

Be it enacted by the Legislature of Alabama:

Section 1. Code of Alabama (1940), Title 46, Section 210, is hereby expressly repealed.

Section 2. Code of Alabama (1940), Title 46, Section 211, is hereby amended to read as follows:

Section 211:

"It shall be unlawful for any person engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public."

Section 3. This act shall become effective immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

EXHIBIT NO. 2

STATE BOARD OF OPTOMETRY

Dear Fellow Optometrists:

Enclosed you will find a copy of House Bill #205 which was passed by the House and Senate. This bill was signed by Governor George Wallace Wednesday, August 4, 1965, 11:59 A. M.

Your Board of Examiners wants you to know the general guidelines that it has adopted so that you might govern your actions relative to the changes to the Alabama Optometry Law as now amended by House Bill #205.

We have adopted a conciliatory rather than a militant approach in urging all optometrists to comply with the Alabama Optometry Law as now amended.

The Alabama Optometric Association in an effort to offer every assistance in the transition from present working conditions to establishing your own private practice has developed a plan that will be made available to those that desire help. You will very shortly receive a copy of this plan.

Your State Board of Examiners is presently considering adoption of new rules and regulations as authorized under the Optometry Law and by the courts and in doing this they are considering some of the worth while rules and regulations that have been adopted, and approved by the courts, by some of our Sister States. In due course these will be announced.

It is the sincere desire of the State Board of Examiners that every Optometrist promptly comply with the Alabama.

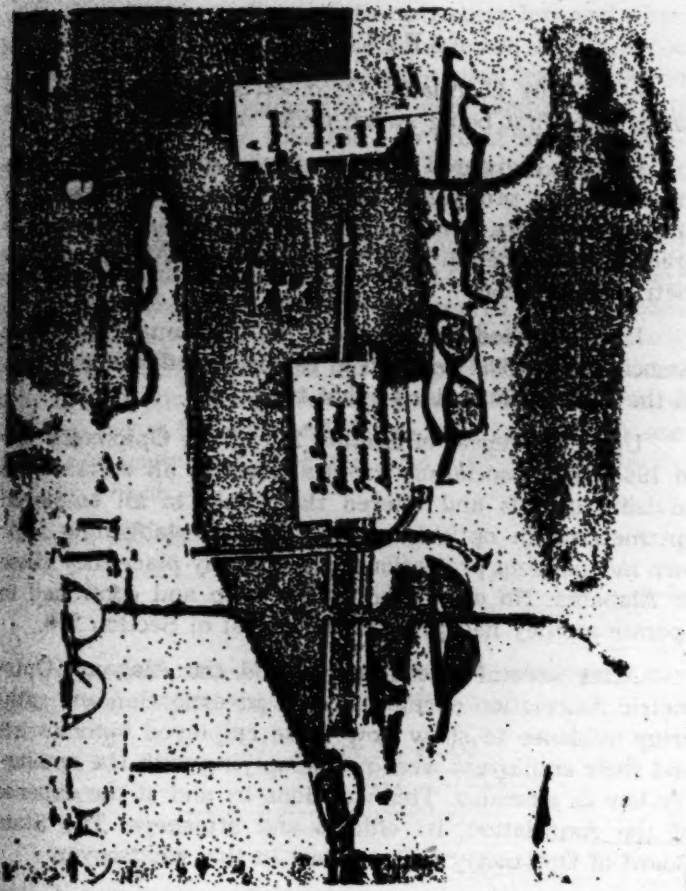
Optometry Law as now amended because the failure to do so will of necessity result in action having to be taken.

Sincerely,

s/ Willard Smith
Secretary Board of Examiners

EXHIBIT NO. 3

EXHIBIT NO. 4



APPENDIX E

AFFIDAVIT

I, Dr. Roy C. Adams, Optometrist, Monroeville, Alabama, after first being sworn under oath state as follows:

I am a registered optometrist in Alabama and have practiced my profession at Monroeville, Alabama for a number of years. I am and have been since I started to practice a member in good standing of the Alabama Optometric Association.

I was elected president of the Alabama Optometric Association in 1964 and served in various official capacities in the Association prior to that time.

Upon the repeal of Section 210 of the Optometry law in 1965, the Association wrote a letter to all optometrists advising of this and offered their help to all employed optometrists in optical departments in establishing their own independent professional practice any place they chose in Alabama. No one accepted our help and continued to operate as they had prior to the repeal of Section 210.

After several weeks had passed the Alabama Optometric Association decided to start investigating and gathering evidence to show how these employed optometrists and their employers were not complying with the optometry law as amended. This was done by and at the expense of the Association, its officers and attorneys. The State Board of Optometry took no part in this whatsoever.

After our investigation and evidence gathered showed Lee Optical Company and its employed optometrists to be doing the same as before and what appeared to be in flagrant violation of the amended optometry law, we instructed our attorneys to prepare an injunction suit against Lee Optical Company, as well as others so engaged, and

their employed optometrists and also to prepare charges against the employed optometrists setting forth their violation of applicable sections of the optometry law and when this was done, and upon advice of counsel, I signed the charges on October 23, 1965, and they were transmitted to the State Board of Optometry for such action they felt should be taken. At no time did I as president of the Alabama Optometric Association try to dictate what action it should take.

Our attorneys felt the evidence justified the filing of an injunction suit against Lee Optical Company and their employed optometrists—so one was prepared and presented to the State Board of Optometry for their consideration and it was later filed. At no time did I as president of the Alabama Optometric Association try to dictate to the Board that they had to file such an injunction suit or did any one else to my knowledge. The suit was filed voluntarily by the State Board.

Dated this the 2nd day of June, 1971.

s/ Roy C. Adams, O.D.
ROY C. ADAMS, OD

Sworn and subscribed before me the undersigned authority, this the 2nd day of June, 1971.

s/ Bruce H. Hood
NOTARY PUBLIC

APPENDIX F

STATE BOARD OF OPTOMETRY,	)	
Complainant	)	IN THE CIRCUIT
	)	COURT OF
VS.	)	MONTGOMERY
	)	COUNTY, ALABAMA,
LEE OPTICAL COMPANY OF ALABAMA, INC., a corporation,	)	IN EQUITY
	)	CASE NO. 36705
Respondent	)	

DECREE

This is an action by The State Board of Optometry (hereinafter sometimes referred to as "the Board") seeking to enjoin Lee Optical Company of Alabama, Inc., a corporation, (hereinafter sometimes referred to as "Lee") from the unlawful practice of optometry, either directly or indirectly in the State of Alabama . . . from employing by any means or arrangement registered optometrists or physicians, surgeons or oculist to examine the eyes of its customers and prescribe eyeglasses for their 'Lee Optical' stores or any other stores owned by it anywhere in the State of Alabama . . ." The Bill of Complaint also prayed for process and for general relief. Originally thirteen licensed optometrists and one physician were included as Respondents, but they have been eliminated as parties by a previous order of this Court.

The questions of whether the Board has authority to maintain this action and whether injunction is the proper remedy have been settled by the Supreme Court of Alabama in a previous appeal in this case. *State Board of Optometry* vs. *Lee Optical Company of Alabama, Inc.*, 284 Ala. 562; 226 So. 2d 623.

This cause was submitted for final decree upon the pleadings as amended and testimony taken ore tenus and both parties have filed briefs. Subsequent to submission, Respondent filed a Motion To Set Aside Submission. Upon consideration of the pleadings as amended and the testimony, the Court makes and enters the following finding of facts:

FINDING OF FACTS

1. That the Board was legally and duly created and constituted and is presently functioning pursuant to Chapter 11, 1940 Code of Alabama, as amended, and is authorized to hold examinations and grant licenses to practice optometry in Alabama; and that at the time this action was filed Dr. Thomas S. Gibson, Huntsville, Alabama, was President; Dr. Willard Smith, Eufaula, Alabama, was Secretary, and that together with Dr. James L. Cash, Selma, Alabama; Dr. George W. Posey, Jasper, Alabama, and Dr. George R. Carlton, Alexander City, Alabama, they constituted the duly appointed and qualified members of the State Board of Optometry.

2. That Lee is an Alabama corporation; that it operates some fourteen stores for the sale of eyeglasses throughout Alabama under the trade name of "Lee Optical", one of which is located at 6 Dexter Avenue, Montgomery, Alabama; and that it also operates other stores for the sale of eyeglasses in Alabama under other trade names.

3. That at the time this action was filed and at all times from then until April 1, 1970, it was the policy and practice of Lee to employ under written contracts of employment and on a salary basis, licensed optometrists and physicians, and that insofar as it was possible to do so, Lee did employ such optometrists and physicians to work for it in its respective "Lee Optical" stores and other stores in Alabama to examine the eyes of and to prescribe glasses for its customers; that under such contracts of employment, the

optometrists and the physicians employed by Lee were under the control of Lee and a supervisor employed by Lee; that the contracts of employment of such optometrists and physicians were terminable by Lee without any notice; that the records maintained by such optometrist and physician employees on patients or customers became and were the property of and under the direction and control of Lee; that under the terms of said contracts of employment the optometrist and physician employees of Lee were specifically required to refrain from any action deleterious or harmful to Lee; that such contracts of employment provided for fringe benefits, including two weeks paid vacation; a profit sharing and pension retirement plan; and group hospitalization and life insurance.

4. That the 1965 Legislature of Alabama through Act No. 218, which was signed by the Governor on August 4, 1965, repealed Section 210 and amended Section 211 of Title 46, Code of Alabama (hereinafter sometimes referred to as "Section 210" and "Section 211" respectively).

5. That subsequent to the repeal of Section 210, the Secretary of the Board notified all optometrists in Alabama, including the optometrist employees of Lee, of the repeal of Section 210.

6. That at the time Section 210 was repealed and for some period of time subsequent thereto, Lee conducted an advertising program under Lee's respective trade names wherein the phrases "Eyes Examined" and "Glasses Fitted" were used; wherein it was sometimes stated that one price included among other things "Your Scientific Examination"; and whereby, generally, the public was led to believe that Lee was qualified to practice optometry; that in some such advertising the names of the optometrist employees of Lee were used, and in some advertising such names were not used; that this advertising program was generally similar for all stores operated by Lee in Alabama; and that at some time subsequent to the repeal of Section 210 and prior

to the trial of this cause, the advertising program of Lee was altered, but to an immaterial extent.

7. That at the time this suit was filed and at all times from then until April 1, 1970, the operation of its stores in Alabama by Lee was essentially the same; that when a prospective purchaser entered a store, he was ushered by a Lee employee into the office or space occupied by the optometrist employee serving that store; that such optometrist employee made a minimal examination of the eyes of said customer and wrote a prescription for glasses; that no fees were charged by the optometrist employees for such examination; that then Lee, through its servants, agents and employees, including the optometrist employees, immediately attempted to make a sale of eyeglasses to the customer; that all patient's and other records were kept and maintained by and were under the direction and control of Lee; that all money involved in the transaction was handled by Lee; that by the very nature of the employment contracts involved, the primary concern of the optometrist employees of Lee was the sale of eye-glasses rather than the welfare of the customers; that prescriptions were written and the sale of glasses were made using documents which bore the name of "Lee Optical"; that as a result of the arrangement between Lee and its optometrist employees and Lee's advertising program, the public was mislead and deceived into believing that Lee was and is qualified to make eye examinations; and that Lee, through its optometrist employees, was making eye examinations and prescribing glasses as well as selling them.

8. That on April 1, 1970, (which was approximately five years after the repeal of Section 210 and shortly prior to the trial of this cause) Lee cancelled its written employment contracts with the optometrist employees serving its stores and entered into a "Lease" agreement whereby it purported to lease space in its respective stores to the optometrist employees serving such stores; that the change of status of the optometrist from that of "Employee" to

"Lessee", was accomplished primarily by telephone; that none of the optometrist employees objected to this change in status; that by such change in status, the optometrist employees gave up the fringe benefits contained in their previous contract of employment; that subsequent to the change of status of the optometrists serving Lee stores from that of "Employees" to that of "Lessee" on April 1, 1970, the only visible difference in the operation of the stores of Lee from the operation of such stores prior to April 1, 1970, was that there was added to Lee's sales documents a charge for eye examinations; that under the lease arrangement, Lee furnishes space "together with adequate and sufficient opthalmic equipment necessary and required . . ." for the optometrists to examine eyes at Lee's stores; that although separate fees are itemized for eye examinations, Lee collects for the eye examination at the time glasses are sold or are paid for and remits to the optometrists on a semi-monthly basis, all such fees collected; that said lease arrangements contained provisions whereby the "lease" can be cancelled upon 10 days notice.

9. That the modern accepted minimum eye examination taught in optometry schools and practiced by the profession consists of essentially five parts:

(1) Case History; (2) Examination of the Outer Eye; (3) Examination of the Inner Eye With an Opthalmoscope; (4) A Refraction; and (5) a Glaucoma Test; that depending upon the assistance available to the optometrist, such a minimum examination takes at least 20 to 30 minutes; that the optometrist employees and lessees of Lee did not and do not conduct such a minimum examination; that basically those optometrists perform only the refraction; that the refraction is the step in the examination that may result in a prescription for eyeglasses; that the average time required for a customer to enter one of Lee's stores, be ushered into the office of the optometrist employee (or lessee), have an examination; and be sold a pair of glasses is 7 to 10 minutes.

OPINION

The Court is convinced that the overriding question in this case is the effect of the repeal of Section 210 and the amendment of Section 211 in August, 1965. Prior to this legislative action, the employment of a duly licensed optometrist by a corporation (or a person or firm) was clearly authorized by the statutory law of Alabama and upheld by the courts. *Alabama State Board of Optometry* vs. *Busch Jewelry Company*, 261 Ala. 479, 75 So. 2d 121; *Busch Jewelry Company* vs. *City of Bessemer*, 269 Ala. 180, 112 So. 2d 344; and *McCrory* vs. *Wood*, 227 Ala. 426, 171 So. 2d 242.

Optometry is one of the emerging professions in the health care field. The weight of modern authority is in favor of the legal consideration of optometry as a profession as distinguished from a trade or business (88 ALR 2d 1290 etc.) In a Mississippi case (*Sears Roebuck* vs. *State Board of Optometry*, 213 Miss. 710, 57 So. 2d 726); the court stated:

> "The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which have arisen in modern times by reason of the necessity for specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine."

The Alabama Supreme Court in *Hampton* vs. *Brackin's Jewelry and Optical Company*, 237 Ala. 212; 186 So. 173, followed the weight of authority in categorizing the practice of optometry as a profession when it said:

> "It cannot be doubted for a moment that the practice of optometry bears a direct and substantial relation to the public health, and that it calls for special skill and knowledge on the part of those practicing it. It was for this reason, no doubt, that the Legislature undertook to legislate upon the subject, that the public might be

protected from fakers and incompetence. We know from common experience that there are many distressing troubles which are attributable to defective eyesight, and which may be cured, or relieved, by properly fitted glasses."

The court further added:

"The Legislature recognizes the fact that no one, without the requisite skill and knowledge, should be allowed to practice optometry . . ."

The court then further said:

"Thus it would appear that the Legislature has seen proper to recognize and regard optometry as a profession, one requiring knowledge of the functioning of the eye, its anatomy, and of pathology as applied to optometry.

"When the optometrist undertakes to make an examination of the eye, with a view of determining whether glasses will be of aid to his patient, he must, of course, bring to bear, in making such examination this professional, or scientific skill, and knowledge, and he can not be directed by his employer, who has no such knowledge. He acts, and must act, in such matters, as his skill and knowledge and independent judgment suggest is the proper course to be pursued."

In spite of the Supreme Court's recognition of optometry as a profession in *Hampton*, it was bound by the statutory law of this state. Prior to the repeal of Section 210 the Court held in three separate cases that neither by Board regulation, city ordinance or ethical code could an attack on corporate practice of optometry be sustained so long as Section 210 was in effect. *Busch Jewelry et al.* vs. *Alabama State Board of Optometry*, supra, *Busch Jewelry* vs. *City of Bessemer*, supra and *McCrory* vs. *Wood*, supra.

Prior to August 4, 1965, Sections 210 and 211, expressed a legislative intent contrary to the law of a majority of the states and contrary to modern philosophy by expressly authorizing the commercialization of the practice of optometry in allowing "any person, firm or corporation" to practice optometry through the employment of a duly licensed optometrist.

This court is convinced that the repeal of Section 210 and the amendment of Section 211 was a recognition by the Alabama Legislature that this state was out of step with the rest of the nation in dealing with the profession of optometry, and that it was not in the best interest of Alabama citizens to maintain the statutory distinction between the practice of optometry and the other professions in the health care field.

This action by the Legislature taken in the light of the two *Busch* cases and the *McCrory* case seems to declare a public policy against the corporate practice of optometry, whether it be direct or by indirection. It must be assumed that the Legislature, in repealing Section 210 and amending Section 211 took into consideration the following statement by the Alabama Supreme Court in *Busch Jewelry et. al.* vs. *Alabama State Board of Optometry:*

> "If there is to be a change in the Legislative policy therein expressed, (Sections 210 and 211) that is a matter for legislative action."

The general rule regarding the corporation practice of optometry is:

> "It is generally held that in the absence of express statutory authority, a corporation may not engage in the practice of optometry either directly or indirectly through the employment of a duly registered optometrist." *13 Am Jur,* Corporations, Section 837.

The Court feels that this role holds twice true when such "express statutory authority" is repealed by the Legislature, in the face of court decisions expressly construing the statute to allow such practices.

In 1969 the Alabama Legislature took another giant step forward by granting further prominence to the profession of optometry through the establishment of a School of Optometry at the University of Alabama in Birmingham.

In light of the action of the Alabama Legislature as described and the status of the profession of optometry in other states, this court is not impressed with the efforts of Respondent at the trial to degrade the profession of optometry. An optometrist, like a dentist, or a physician, has a relationship with his patients that cannot be nurtured in the market place. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. If an optometrist is the employee of an optical concern whose main interest is the sale of optical goods, such relationship tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient. Surely an optometrist should be absolutely independent of everything and everybody except his profession and the people who confidentially depend upon him to aid them in improving and preserving their sight.

The Court is, however, impressed with the efforts of the State Board of Optometry and individual practitioners to improve and upgrade the profession of optometry. Apparently the Alabama Legislature has joined in this movement. This Court can do no less.

The Court holds that the action of the Alabama Legislature in repealing Section 210 and amending Section 211, terminated the right that Lee had to conduct an optical dispensing business with the aid and assistance of an optometrist employee. There is no longer in Alabama statutory authority for a person, firm or corporation to operate a

business wherein eyes are examined and glasses are fitted even with a licensed optometrist on the premises, and the Court holds that it is unlawful for Lee to do so or to advertise to the effect that it is qualified to do so.

Notwithstanding the repeal of Section 210, Lee continued to operate its stores throughout Alabama with the assistance of employed optometrist until April 1, 1970.

The circumstances surrounding the change of the modi operandi of Lee on April 1, 1970, convinces the Court that this action was simply a subterfuge engaged in between Lee and its former employees to continue their former unlawful arrangement through a sham lease arrangement.

The ease with which Lee was able to convert its employment contracts with its optometrists into leases; the lack of objection on the part of the optometrist employees to giving up fringe benefits; the similarity in the operation of the stores before and after the change; the continuation of the minimal eye examination by the optometrists, and the retention by Lee or the right to terminate the "Leases" on short notice, indicate a continuing control by Lee over its optometrists that is not commensurate with the freedom necessary for a professional person to concern himself primarily with the best interests of his patients. The fact that Lee continued to operate under its employment contracts for nearly five years after the repeal of Section 210 and until shortly prior to the trial of this cause does not speak well of its good intentions.

There are many cases in other states where corporations unlawfully engaging in the practice of optometry through employees attempted to circumvent the law with "lease" arrangements. In the Ohio case, *Rowe* vs. *Standard Drug Company*, 132 Ohio St. 629, 9 N.E. 2d 609, wherein an employment arrangement was changed to a lease arrangement the court stated that it was not limited to the terms of the lease, but would consider the manner in which the optical business was conducted and the extent to which the

corporation participated in transactions involving optometrists. That Court said:

> "Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The Courts will always pierce the veil to discover the real relationship. Where a corporation directly or indirectly engages in the practice of optometry the lease will afford no protection on a proper challenge of the illegality."

In years gone by there are many reported cases which show that the professions of medicine and law had to resort to courts of equity to enjoin and stop commercialists who would debase those professions for personal profit with little or no regard for the welfare of the public. In more recent times, the profession of dentistry had to follow that same trail. The profession of optometry is now involved in a similar battle. This Court has no alternative under the law but to assist this effort.

It is therefore CONSIDERED, ORDERED, ADJUDGED and DECREED as follows:

1. That the Motion To Set Aside Submission heretofore filed by Respondent be, and the same is hereby denied.

2. That Lee Optical Company of Alabama, Inc., be and it is hereby enjoined, restrained and prohibited from engaging in the practice of the profession of optometry, either directly or indirectly, and from employing, by any means, whether directly or indirectly, licensed optometrists or physicians to examine the eyes of its customers and prescribe eyeglasses for them.

3. That Lee Optical Company of Alabama, Inc., be, and it is hereby further enjoined, restrained and prohibited from keeping optometrists, whether by contract of employment, by lease agreement or device, in its places of busi-

ness in Alabama for the purpose of examining the eyes of and prescribing eyeglasses for its customers.

4. That Lee Optical Company of Alabama, Inc., be and it is hereby further enjoined, restrained and prohibited from showing on its store fronts or in any other advertising elsewhere by whatever means, the name of any optometrist or physician and from using in any such advertising phrases "Eyes Examined," "Glasses Fitted," "Your Scientific Eye Examination," and from using in any such advertising, any other words, phrases or expressions which will in any way indicate to the public that it is qualified to or will examine eyes or fit glasses or which would tend to indicate to the public that Lee will or is qualified to examine the eyes of its customers or fit eyeglasses for them in connection with the sale of its eyeglasses.

5. That Lee Optical Company of Alabama, Inc., be and it is hereby further enjoined, restrained and prohibited from making any arrangement with any optometrist or physician whereby it would refer its customers to such optometrist or physician or whereby such optometrist or physician would refer their patients to Lee, for the specific purpose of promoting the sale of Lee's eyeglasses, regardless of where such optometrist or physician is located.

6. That Lee Optical Company of Alabama, Inc., be and it is further enjoined, restrained and prohibited from making referrals of customers to any specific eye specialist or indicating the possible convenience of a nearby eye specialist.

7. That this decree be and the same is hereby made applicable to all officers, agents, servants and employees of Lee Optical Company of Alabama, Inc.

8. That it is not the intention of this Court through this decree, and the same will not be construed, to enjoin Lee Optical Company of Alabama, Inc., from pursuing the trade or business of a dispensing optician, so long as it does

so in a lawful manner and so long as it does not attempt to unlawfully practice optometry through its agents, servants or employees, or through any other arrangement, either directly or indirectly, anywhere in the State of Alabama in any establishment owned or controlled by or in any manner connected with it.

9. That, this decree constituting a prohibitory injunction and not coming within the provisions of Title 7, Section 793-795, Alabama Code, the Respondent will not be allowed to supersede this decree pending any appeal herefrom. (Stricken by Amendment and Supersedeas granted.)

10. That the Respondent, Lee Optical Company of Alabama, Inc., be and it is hereby taxed with the costs herein accrued for which let execution issue.

Done this 17 day of March, 1971

/s/ RICHARD EMMET
CIRCUIT JUDGE IN
EQUITY SITTING

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APPENDIX C

STATE BOARD OF OPTOMETRY COMPLAINANT	)	CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA EQUITY DIVISION
VS.	)	
HOUSE OF $8.50 EYE-GLASSES INC. a corporation, et al RESPONDENTS	)	CASE NO. 159-616

FINAL DECREE

This cause was originally filed and several preliminary pleadings were filed and determined in the Bessemer Division of this Court. Later, the cause was transferred to this division. An extended oral hearing was held in this division to the merits of the cause before another judge who took the matter under submission under a note of testimony filed in Open Court on July 14, 1970. On July 6, 1971, the cause was refiled and resubmitted to the undersigned judge. As to the validity and propriety of the rulings upon pleadings anterior to this instant Final Decree, this Court will consider itself bound, and particularly, because there has been no re-presentation or objection thereto by counsel for the several parties.

This cause presents a justifiable controversy properly filed and heard and determined in a Court of Equity. The prayers of the Bill of Complaint as finally amended are, essentially, as follows: First, that the Respondent Corporation as it acts through its departments and agents in the employment of registered optometrists, physicians, surgeons or oculists to examine the eyes of its customers and prescribe eyeglasses is an unauthorized and unlawful practice of the profession of optometry as defined in the statutes and the case law applicable thereto in the State of Alabama; and, second for a prohibitory injunction against all Re-

spondents in the cause from any unlawful practice of optometry, either directly or indirectly in the State of Alabama and the corporate Respondent particularly from employing by any means or arrangement registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses therefor anywhere in the State of Alabama; and third, for general relief.

The Court has been furnished with briefs by counsel and has carefully reviewed the multitude of cases in this jurisdiction and throughout the United States relative to the issues posed by the pleadings in this cause, and particularly the statutes which treat the profession of optometry.

There would be no particular virtue in a recitation of the evidence and any findings of fact by the Court, except that the Court does find, that as hereinafter set forth, Complainant, State Board of Optometry, is, substantially, entitled to the specific reliefs prayed.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

ONE: That House of $8.50 Eyeglasses, Inc., a corporation is hereby enjoined from, either directly or indirectly, employing by any means or arrangment registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses therefor anywhere in the State of Alabama.

TWO: All individual Respondents are hereby enjoined from any unlawful practice of optometry, either directly or indirectly, in the State of Alabama.

THREE: That the House of $8.50 Eyeglasses, Inc., a corporation in its employment through its departments and agents of registered optometrists, physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses for them is an unauthorized and unlawful

practice of the profession of optometry as defined in the laws and statutes of the State of Alabama.

FOUR: The Respondent, House of $8.50 Eyeglasses, Inc., is hereby taxed with the costs of this action, for which let execution issue.

DONE and ORDERED this the 8th day of July, 1971.

/s/ Wm. P. Barber
CIRCUIT JUDGE IN EQUITY SITTING

cc: Hon. Thomas F. Parker
Hon. Richard A. Billups, Jr.
Hon. Lee Baines
Hon. William G. West

APPENDIX B

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APPENDIX I

AFFIDAVIT

I, Dr. James L. Cash, Optometrist, 12 Broad Street, Selma, Alabama, after first being duly sworn under oath states as follows:

I am a registered optometrist in Alabama and have practiced my profession in Selma, Alabama, for over twenty (20) years. I am, and have been since I started to practice, a member in good standing of the Alabama Optometric Association.

I was appointed to serve as a member of the Alabama State Board of Optometry in 1956 and served continuously until early 1971 when my successor was appointed upon the expiration of my then current term. I have served as long if not longer on the Alabama State Board than any other optometrist.

It is an unwritten understanding when a member of the Alabama Optometric Association is appointed to the State Board that he will no longer take an active part in Association activities or accept an office of officer in the Association because many years ago and prior to 1955 it became clear, and we were so advised by legal counsel, that the members of the State Board, in addition to conduction examinations of new licenses, we would be called upon to hear and decide any charges against an optometrist that might be filed and therefore should take no part in or advise any one with reference to any such charges because it was the duty of the Board members to refrain from reaching a decision on any such matter until it was heard by the Board, as provided in the Alabama Optometry Law, after which the Board members would then decide the matter.

About the same time the Association members were made aware of the responsibilities of the State Board mem-

bers and that they, individually or an an association, would have to assume the responsibility of making investigations that might lead to the filing of charges against an optometrist and if any such were to result in charges it would be up to the Association members or officers to prepare, document, and file them with the State Board. It then became the Board's decision as to further action, if any, to be taken by the Board, including the scheduling of a hearing as provided in the Alabama Optometry Law.

At no time since the charges were filed with the Board against the optometrists then employed by Lee Optical Company in 1965 has the Alabama Optometric Association or any member thereof, tried to dictate or even suggest to the State Board how these charges would be handled or action to be taken by the Board on them.

I was president of the State Board during most of the last two years. I served on the State Board and sat through the trial of the Lee case before Judge Emmet as representative of the State Board. With reference to the Lee suit and others filed by the State Board, all of the investigation, taking of pictures, affidavits of prospective witnesses and all acts taken in the investigation of Lee and other companies with reference to their compliance with the Alabama Optometry Law, after the repeal of Section 210 thereof, was conducted by the Alabama Optometric Association and its officers and at its expense, a bill of complaint against Lee Optical, together with exhibits attached, was then presented to the State Board for their consideration in filing it. The Board decided it should be filed and this was done without the Board reaching a conclusion as to the merits of the charges.

The State Board decided it would be helpful in hearing and reaching a decision on the charges filed against the individual optometrists to wait until one of the lawsuits was tried since any such court decision would serve as a guide for the Board. The individual optometrists were then

notified of and furnished a copy of the charges, and told they would be advised later of the time and place for a hearing as provided by the Optometry Law.

Shortly prior to the trial in State court of the Lee case, the charges against the optometrists employed by Lee were scheduled for hearing and upon being assured by their counsel in a letter to our attorney that the Board members would not be challenged for cause for participating in the trial, the hearings were continued. No Board member took or was called to the witness stand in the Lee trial. After the Lee case was decided by Judge Emmet these charges were again scheduled for hearing and upon the filing of the suit in Federal Court our counsel readily agreed to voluntarily continue them again to await a decision on the motion for a temporary restraining order and on the motion to dismiss filed by the defendants.

Dated this the 2nd day of June, 1971

s/ James L. Cash, OD
JAMES L. CASH, OD

Sworn and subscribed before me the undersigned authority, this 2nd day of June, 1971.

s/ Joyce Robinson
NOTARY PUBLIC

APPENDIX J

ALABAMA STATE BOARD OF OPTOMETRY

Office of the Secretary
P. O. Box 286
Eufaula, Alabama, 36027

July 9, 1971

To ALL ALABAMA OPTOMETRISTS:

Your attention is invited to the enclosed Regulation #1 of 1971 recently adopted by the State Board of Optometry. This is for your information.

Sincerely yours,

s/ Willard Smith
Secretary

ALABAMA STATE BOARD OF OPTOMETRY

Office of the Secretary
P. O. Box 286
Eufaula, Alabama 36027

MINUTES OF THE STATE BOARD OF OPTOMETRY

Regulation No. 1—1971

Pursuant to Section 194, Title 46 of the Alabama Optometry law, it is made the duty of the Alabama State Board of Optometry to make regulations as provided therein and pursuant thereto the State Board of Optometry in session duly assembled, on this 13th day of June, 1971, in the City of Montgomery, Alabama, there being a quorum present and participating duly adopted the following regulation to be known as Regulation No. 1, 1971:

Since Section 206, Title 46 of the Alabama Optometry law provides for an appeal in cases of suspension or revoca-

tion of a license holder, after a hearing before the Board as provided in said Section 206, the holder may appeal to the Circuit Court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked or suspended resides but failing to specify the procedure by which any such appeal will be accomplished, the Board adopts the following with reference to any such appeal:

When a license holder desires to appeal from any holding or decision made by the State Board in a case against him, he shall within 15 days from the date such decision is announced by the Board file in writing with the Secretary of the Board notice of his intention to appeal. He shall have thereafter 30 days in which to prepare a transcript of the proceedings against him including any testimonies for filing with the Circuit Court in the county of his residence and if the reporter is unable to prepare the transcript within this time he shall make application to the president of the Board for additional time, in a reasonable amount, and said extension shall be approved. Thereafter when the transcript is so filed the appeal will be perfected to await the decision of the Circuit Court. Any appeal from the decision of the Circuit Court will be made to the Appellate Court of Alabama in the manner now provided by law for the appeal of equity cases. From the time the decision of the State Board of Optometry is announced and while an appeal is pending in the courts awaiting a final decision, the execution of any revocation of license or suspension thereof will be stayed and no action to enforce same will be taken by the State Board of Optometry. If at any time an appeal is abandoned or not pursued as provided herein and by law the Board will then be free to give 10 days notice to the license holder of such abandonment of his appeal and if said appeal is not reinstated or perfected as provided by law the Board can then take such action as it deems necessary to carry out the decision it had formerly announced following the hearing before it. Also if the decision of the

Board is finally affirmed on appeal the Board will then notify by registered mail, return receipt requested, the license holder of its action to be taken to enforce its decision and give him 30 days within which to comply therewith.

The Board took up the further matter of the Bill of Complaint for an injunction having been signed and verified by Dr. Thomas Gibson, then President of the State Board of Optometry and presently a member thereof, and concluded that if an optometrist who was a named defendant in any such suit and against whom charges were pending before the Board to revoke his license challenged Dr. Gibson for cause to sit as a member of the Board hearing charges against him, the Board now feels it would be proper for it to sustain such challenge and Dr. Gibson would be excused and the charges heard by the remaining Board members, not challenged for cause and excused so long as a quorum remained was present so the Board could function as such, would proceed to a hearing on the charges as provided in Section 206, Title 46 of the Alabama Optometry Law.

Certified as a true copy—

/s/ E. E. Ashbee
E. E. Ashbee, OD
President of the Board

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, et al.	)	
	)	
Plaintiffs	)	
	)	CIVIL ACTION
Vs.	)	NO. 3339-N
	)	
THOMAS S. GIBSON, et al,	)	
	)	
Defendants	)	

STIPULATION

It is stipulated by and between the parties as follows:

1. Paragraphs 2, 3 (a), 3 (c), 4, 5 and 6 are admitted by all of the parties, both plaintiff and defendant.

2. At the time notice of the August 1970 hearings were given plaintiffs demanded that the respondent State Board of Optometry recuse itself, a copy of the demand being attached hereto as Exhibit 1. Subsequently the August hearing was postponed by mutual agreement of the plaintiffs and defendant State Board with the stipulation that neither party's position would be altered by so doing. This agreement is set out as Exhibit 2.

3. Plaintiff optometrists are all licensed, practicing optometrists in the State of Alabama. In October of 1965 when the original charges were preferred against them, they were all employees of Lee Optical Company of Alabama, Inc., a corporation. Lee Optical Company of Alabama, Inc. is a corporation engaged in the business of optical dispensing. It sells eyeglasses at an advertised price. Prior to October 1965 Lee advertised eyeglasses, advertised that it *conducted* or *furnished* eye examinations by a

registered optometrist on its premises. Exhibit 3 depicts advertisements and photographs of Lee's premises showing the advertising conducted upon its premises. The optometrists employed in the Lee stores were employed on a salary. No charge was made for eye examinations except instances where the patient did not need eyeglasses. In those instances a nominal charge was made for the examination which went into Lee's receipts with the optometrist getting no part of it. A copy of the employment contract in use between Lee and its optometrists at the time of the filing of the charges against the Lee optometrists is attached hereto as Exhibit 4 with deposition testimony of Dr. William B. McCrory who identified the employment contract.

4. In October of 1965 Lee modified its advertising program by taking out of any advertisements any references to optometrical examinations or optometric services. Its ads were directed toward the advertisement of eyeglasses. A copy of the ad in use which is typical of those used since October 1965 is attached hereto as Exhibit 5. The store windows of Lee Optical do not contain any reference to an optometrist or that an optometrical examination is available inside the store.

5. In April 1970 Lee entered into a new agreement with its optometrists, a copy of which is attached hereto as Exhibit 6. This agreement in substance allowed the optometrist to lease the optometrical office and equipment from Lee, to occupy the space therein for the purpose of conducting eye examinations and to set his fee. Arrangements were made whereby the Lee clerical help collects the fees which are charged, posts them on a balance sheet and Lee remits the fees to the optometrist. There is no other pecuniary arrangement between the optometrist and Lee. All pension plans, withholding tax arrangements, group insurance plans and other employee benefits which had been available to the optometrists through Lee were discontinued as of April of 1970.

Under the present arrangements the optometrist conducts examinations in the leased premises within the Lee Optical dispensary. He does not pay any rent. The consideration to Lee is the availability of an optometrist to examine eyes of patients who come in without prescriptions for glasses. Lee receives no part of the fee for the optometric examination and the optometrist receives nothing from Lee by way of remuneration because of the sale of a pair of eyeglasses. The additional examination fee is now paid by the customer who comes in.

The optometrists in the Lee Optical stores do not advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

6. Defendants Gibson, Ashbee, Carlton, Warr and Smith, members of the State Board of Optometry of the State of Alabama are also members of the Alabama Optometric Association. Dr. Thomas S. Gibson was a member of the Legislative Committee of the State Association in 1965 and also a member of the Board of Optometry. As President of the Board of Optometry he signed the complaint in a civil suit, the complaint in which is attached as Exhibit 7 by which he made affidavit as to the truth of certain charges against plaintiffs. Board members at the time of the filing of the complaint against plaintiffs were defendants Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Willard Smith and James L. Cash.

7. The Alabama Optometric Association consists of approximately 100 members. The dues paid by each member are $240 per year; of this $140 goes to the American Optical Association. These dues are used to finance the Association's activities and also to defray legal expenses of investigating and initiating charges against plaintiffs in this action. The Alabama Optometric Association has for several years been interested in eliminating "corporate practice" which the plaintiffs are alleged to be engaged in

by being employed by Lee Optical Company or *by practicing on its premises.* In 1965 the Alabama Optometric Association was active in securing the repeal of Section 210 of Title 47 of the Optometry Code of the State of Alabama. This was the section which allowed and required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Defendants Gibson, Carlton, Smith, Ashbee and Warr contributed to a legislative fund raised by the Alabama Optometric Association to promote the repeal of these sections, the repeal of which allegedly makes the practice of plaintiffs illegal.

8. The State Board of Optometry has no rules or regulations governing the practice of optometry within the State of Alabama. The charges pertaining to the plaintiffs in this instance involve an alleged violation of the State Code regulating the practice of optometry as it presently exists.

9. It is stipulated by and between the parties that Section 210 of Title 47 was repealed August 4, 1965, that charges were initiated by the Alabama Optometric Association against plaintiffs and filed with the State Board October 23, 1965, a copy of the said charges made against each optometrist being the same as Exhibit 8 hereto made against Dr. Harry Sparks, that civil suit was filed by the State Board against plaintiffs and Lee Optical on October 25, 1965, a copy of the complaint and exhibits thereto being attached as Exhibit 7.

10. Attached to the original of this stipulation are depositions of Dr. William B. McCrory and members of the State Board of Optometry taken May 21 and 22, 1970 and it is stipulated that the parties would so testify in this action.

11. It is further stipulated by and between the parties that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

12. It is further stipulated that each of the plaintiffs, if called to testify, would testify that Lee Optical Company of Alabama, Inc. had never interferred with his professional practice, called upon him to alter his judgment and that his professional judgment was in no way affected or impaired, nor was his allegiance to his patients impaired or affected by reason of the fact that he practiced on the premises of a dispensing optician.

13. Mr. Gene Shanbaum of Dallas, Texas, Secretary of Lee Optical Company, testified in the trial of *State Board* v. *Lee* in the Circuit Court of Montgomery County that he had checked the records of Lee Optical and that in 1969 Lee sold 75,000 pairs of glasses in Alabama.

14. The Alabama Legislature created the School of Optometry in 1968 to be located in the Medical Complex of the University of Alabama at Birmingham and it is now in its second year of teaching optometry students.

15. Drs. Pillion and Sparks, who had formerly been employees of Lee and now practice as lessees on Lee's premises, testified in the *State Board* v. *Lee* trial that they made more money as lessees of Lee under their present arrangement than they had as a salaried employee for Lee.

16. Dr. Milton E. Warr was appointed to the State Board of Optometry on or about January 1, 1971 and prior to that time had no contact with the charges against the plaintiffs or the suit against Lee Optical Company.

17. The employment agreement which Lee had with its optometrists prior to April of 1970 and the lease arrangement presently in use both contain a 10 day cancellation clause.

18. If called to testify Dr. George R. Carlton, a member of the State Board, will testify that by-laws of the Association provide that the Association recommend names to the Governor for appointment to membership on the State Board. The Association in years past has made this

recommendation, but has rarely been followed by the Governor. In recent years no recommendation has been made. None of the present Board members were recommended by the Association for appointment. There is no provision in the optometry law which allows the Association to nominate Board members.

19. There is no provision in the optometry laws or elsewhere for the appointment of a new Board if the present Board is enjoined from hearing pending charges.

20. The House of $8.50 Eyeglasses has now been decided by the Circuit Court in Birmingham and is in the process of being appealed; a copy of the Circuit Court decree is attached as Exhibit 9.

21. Section 210 of the optometry law was repealed on August 4, 1965. There was no change in the signs and advertising done in all the Lee stores until after the charges here involved were filed on October 23, 1965 and the suit filed against Lee and its optometrists several days later.

22. The State Board of Optometry adopted Resolution No. 1 on June 13, 1971; a copy of the Resolution being attached hereto as Exhibit 10.

23. All exhibits attached to pleadings, briefs or other documents heretofore filed with the court are admitted as to genuineness and what they purport to be for the convenience of the court; however, by admission of documents or this stipulation, neither of the parties admit the relevance thereof as to the issues.

s/ Douglas E. Bergman
Douglas E. Bergman

s/ Harry Cole
Harry Cole

Attorneys for Plaintiffs

s/ J. G. L. Marston III

s/ Donald G. Valeska II
Deputy Assistant
Attorneys General

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.,

Attorney for Defendants

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FILED
Jul. 30, 1971
JANE P. GORDON, Clerk
By _____
Deputy Clerk

L. M. BERRYHILL, ET AL,)
)
Plaintiffs,)
) CIVIL ACTION
VS.) NO. 3339-N
)
THOMAS S. GIBSON, ET AL,)
)
Defendants.)

ORDER ON PRE-TRIAL HEARING

This cause coming on to be heard on a regular pre-trial hearing and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed: the complaint and amendment thereto; Defendants' motion to dismiss; and Defendants' answer.

2. It was agreed by all parties that the Defendants' motion to dismiss should be continued and consolidated with other issues for a hearing by the three judges empaneled to hear this cause, and further proceedings on said motion are hereby ORDERED continued. It is further ORDERED that the first and second causes of action be, and the same are hereby, consolidated with the motion to dismiss for trial and that this cause is set for trial in the

United States District Court, Second Floor Courtroom, Federal Building, Montgomery, Alabama, on the 16th day of August, 1971, at 10:00 o'clock A.M., on the issues of fact and law presented by the complaint, the amended complaint, the motion for preliminary injunction, the motion and amended motion to dismiss, and the Defendants' answer.

3. It was agreed by all the parties that the case would be submitted on written stipulations or depositions on or before August 16, 1971, and it is the ORDER of this Court that all discovery be completed on or before August 10, 1971, and that the parties file with the Court briefs covering the law of the case on or before August 13, 1971.

4. It was agreed by all of the parties that the following are all of the issues in controversy in this cause: that Plaintiffs claim to be optometrists who will be harassed, irreparably damaged, and illegally and unconstitutionally deprived of their rights to pursue their profession if this Court does not enjoin Defendants, members of the State Board of Optometrists of the State of Alabama, from prosecuting proceedings in that body to revoke Plaintiffs' licenses and to deprive the Plaintiffs of their right to practice optometry in the State of Alabama. They claim that the procedure by which the Board is given authority to regulate their practice is violative of their rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution for the following reasons:

A. The charges against Plaintiffs before the State Board are alleged to be too vague to sufficiently apprise the Plaintiffs of the charges against them.

B. The Board is charged with being prejudiced and biased against the Plaintiffs because of the Board members' prior activities in proceeding against the Plaintiffs and because of a pecuniary interest in excluding the Plaintiffs from practicing optometry.

C. It is charged that the law and rules of the Board improperly and unconstitutionally discriminate against the Plaintiffs as a state law provides that the Governor shall appoint, from the membership of the Association, the Board of Optometry which governs practice of optometry within the state and a by-law of the Optometrists' Association prohibits employed optometrists from membership in the Association. Plaintiffs contend they are thereby deprived of an opportunity to participate in the government of their own profession.

D. It is charged that the law providing for suspension of licenses of the Plaintiffs is unconstitutional as it provides for suspension by the Board with no provision for supersedeas on appeal to a court for review of suspension of the license.

5. Plaintiffs withdraw the charge in their complaint that the Board is estopped from prosecuting its suspension of license proceeding against Plaintiffs because it has annually renewed their licenses to practice, and the Plaintiffs withdraw, without prejudice, their claim for damages.

6. The Defendants, by motion, deny federal jurisdiction and, by answer, set up the following defenses:

A. They deny that charges against the Plaintiffs in the State Administrative proceedings are imprescise, and the parties agree that the charges against the Plaintiffs in the said state proceedings involve no charges of breach of ethics but are concerned only with the Plaintiffs' having violated laws.

B. Defendants deny that the hearing lacks due process of law.

C. Defendants insist, by virtue of Regulation 1, 1971, adopted by the Board, providing for supersedeas and recusal of Board members who have interests in

the proceedings, that due process will be accorded Plaintiffs on hearing in the Administrative proceedings.

D. They admit that a by-law of the Association prohibits optometrists who are employed by any company from being members of the Association, and they admit that the law provides that only members of the Association may be appointed to the Board. They further admit that the Board does control the practice of optometry in the State of Alabama.

It is, therefore, ORDERED by the Court that all of the above-named allowances and agreements be, and the same are hereby, binding upon all parties in the above-styled cause, unless this order be hereafter modified by order of this Court.

DONE this 30th day of July, 1971.

s/ R. E. Varner
United States District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, RICHARD T. WOOD, WILLIAM B. McCRORY, FRANKLIN H. PEARCE, B. J. FITZSIMMONS, WILLIAM BAYA, JR., JAMES J. COUCH, JAMES A. MILLER, HOWARD W. SMITH, J. HARRY SPARKS, O. L. WILSON, ROBERT M. HOWARD and JOHN H. PILLION,

PLAINTIFFS

VS.

CIVIL ACTION
NO. 3339-N

THOMAS S. GIBSON, E. E. ASHBEE, GEORGE R. CARLTON, MILTON E. WARR, and WILLARD SMITH, Individually and as members of the State Board of Optometry of the State of Alabama; STATE BOARD OF OPTOMETRY OF THE STATE OF ALABAMA, ALABAMA OPTOMETRIC ASSOCIATION, an unincorporated association, J. E. THOMPSON, President of Alabama Optometric Association, and ROY C. ADAMS,

DEFENDANTS

[Return Receipt shows filed on Sept. 22, 1971]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr, and Willard Smith, Individually and as members of the State Board of Optometry of the State of Alabama; State Board of Optometry of the State of Alabama, Alabama Optometric

Association, an unincorporated association, J. E. Thompson, President of Alabama Optometric Association, and Roy C. Adams, the Defendants above named, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on September 3, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.
Attorney for Defendants
P. O. Box 1056
Jackson, Mississippi 39205

J. G. L. MARSTON, III
DONALD GEORGE VALESKA, II
Assistant Attorneys General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104
OF COUNSEL

PROOF OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Defendants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st of September, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on all parties required to be served, by depositing a copy of such Notice of Appeal in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
Hill Building
Montgomery, Alabama

2. Honorable Douglas E. Bergman
Mercantile Bank Building
Dallas, Texas 75201

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 653

THOMAS S. GIBSON, ET AL.,

APPELLANTS,

v.

L. M. BERRYHILL, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION TO AFFIRM

Appellees, Plaintiffs below, pursuant to Rule 16 of the Revised Rules of The Supreme Court of The United States, move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The unanimous opinion of the three-judge District Court is not yet reported. A copy of the opinion, judgment, and order of the Court is attached as Appendix

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1253.

QUESTION PRESENTED

Whether the District Court erred in restraining and enjoining Appellants, Defendants below, individually and as members of the State Board of Optometry of the State of Alabama and their successors in office, from conducting a hearing on charges preferred against Appellees to revoke their licenses to practice optometry within the State of Alabama, when the Board members had previously asserted Plaintiffs guilty of the offenses charged and also had a pecuniary interest in the result of the proposed hearings.

STATEMENT

PROCEDURAL HISTORY

This is a direct appeal from the final order and judgment entered by a three-judge District Court convened pursuant to 28 U. S. C. §§ 2281 and 2284.

The action was brought by Appellees, Plaintiffs below, optometrists duly licensed to practice in Alabama and who were employed by a corporation, against the Defendants, Appellants, members of the State Board of Optometry and who are in private practice, asking the District Court to enjoin Appellants, Defendants, from conducting a hearing on charges theretofore preferred against the Plaintiffs, and from revoking or suspending the licenses of Appellees to practice optometry in Alabama.

Plaintiff-Appellees, alleged in their complaint that the actions of the Defendant Board in seeking to revoke their licenses to practice optometry in Alabama de

prived them of the right to engage in their chosen profession and earn a livelihood, contrary to the due process clause of the Constitution of the United States.

DECISION OF THE DISTRICT COURT

Upon written stipulation of the parties (Appendix B), the three-judge District Court enjoined the scheduled hearings before the State Board of Optometry, holding that the application of Section 206, Title 46, Code of Alabama, as to the Plaintiffs, violated the Plaintiffs' rights to due process because the Defendants were possibly biased or prejudiced and had a pecuniary interest in the outcome of the proceedings.

ARGUMENT

The decision below presents one Federal question, which was correctly decided, thereby presenting here no substantial question needing further argument. The District Court held that the evidence presented by the stipulation of facts and exhibits thereto showed that Defendants, Appellants, were possibly biased so that they could not conduct the fair, impartial hearing required if Plaintiffs were to be afforded the due process of law guaranteed by the Constitution of the United States. The District Court quoted from *In re Murchison*, 349 U. S. 133, as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and rela-

tionships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U. S. 510, 532, 71 L. Ed. 749, 758, 47 S. Ct. 437, 50 A. L. R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U. S. 11, 99 L. Ed. 11, 75 S. Ct. 11."

The stipulated evidence upon which the decision was based clearly shows the bias and prejudice which permeated and surrounded the threatened State Board of Optometry hearings. Section 192 of Title 46, Code of Alabama 1940, provides that members of the Alabama State Board of Optometry shall be "a member in good standing of the Alabama optometric association, incorporated, or its legal successor." It is undisputed that Appellants, present members of the State Board of Optometry, were selected in accordance with Section 192 as members have been selected in the past. The By-laws of the Alabama Optometric Association prohibit membership of *any optometrists* who are *employed by corporations;* thereby excluding Plaintiffs from membership in the Association from which Board members of the profession's governing body, under Alabama law, must come.

It is stipulated in paragraph 7 of the Stipulation that the Alabama Optometric Association consists of ap-

proximately 100 members and that the dues paid by members are used to finance Association activities, and to defray legal expenses of investigating and initiating and prosecuting charges against the corporation-employed optometrists who are the Plaintiffs in this action. The Alabama Optometric Association and State Board have for several years been engaged in eliminating *"corporate practice"*, in which the Plaintiff-Appellees, are alleged to be involved, either by being employed by Lee Optical Company or by practicing optometry on Lee's premises. In 1965 the Alabama Optometric Association procured the repeal of Section 210 of Title 46 Optometry Code of the State of Alabama, which section had required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Appellants Gibson, Carlton, Smith, Ashbee and Warr (State Board members) contributed to a legislative fund raised by the Alabama Optometric Association to lobby the repeal of these sections; the repeal of which makes the Plaintiff-Appellees', practice illegal. [Under Appellants' theory]

Appellants Gibson, Ashbee, Carlton, Warr and Smith, presently members of the State Board of Optometry, are also members of the Alabama Optometric Association (Stipulation, Par. 6, Appendix B). Dr. Thomas S. Gibson was a member of the legislative committee of the State Association in 1965 and also a member of the State Board of Optometry. In 1965, as president of the Board of Optometry, Dr. Gibson signed a sworn complaint in a civil suit which sought to prohibit these same Appellees from practicing optometry in Alabama. (Appendix D) At the time of filing of the civil action in State Court against Plaintiff-Appel-

lees, Appellants Gibson, Ashbee, Carlton and Smith were members of the State Board. The civil suit alleged that Plaintiff-Appellees, were guilty of lending their licenses to a corporation, employing cappers and steerers and various other offenses. The administrative charges, prosecution of which was enjoined by the District Court, were based on the same offenses as those the Board had declared Plaintiff-Appellees, guilty in the earlier filed civil suit. See affidavit of Roy C. Adams (Appendix E)—the basis of charges to be heard by the Board.

Subsequent to verification of the bill of complaint by Dr. Gibson in the civil suit, charges were made against the Plaintiffs, Appellees, which were to be heard and decided by the same State Board of Optometry, comprised of Appellants Gibson, Ashbee, Carlton, Warr and Smith, all private practitioner members of the Alabama Optometric Association. The object of Board charges obviously was the revocation or suspension of the Plaintiff-Appellees' licenses; this being the only disciplinary measure available by law to the State Board of Optometry.

On the stipulated facts the District Court correctly observed:

> "In the instant case, there is evidence that those who are to judge the matters of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs [Appellees] worked, issued over 75,000 eyeglasses in one year. Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business. . . ."

The only substantial Federal question possibly presented is whether the District Court erred in enjoining Appellants from proceeding with pending hearings. Certainly, Appellees would have been denied the right to a fair hearing before a fair and impartial tribunal and therefore subject to deprivation of their licenses to practice optometry without due process of law had the scheduled hearings been held.

The District Court, in enjoining the Appellants, held Sections 192 and 206 of Title 46, Code of Alabama, unconstitutionally applied as to these Appellees; the Court stating:

> "Pleadings and uncontradicted evidence in the instant case indicate that Plaintiffs have been actively practicing their professions since prior to 1965 and that the cases against them have been pending since that time, that the individuals who will act as judges of their cases are largely the same individuals who in 1965 supported prosecution of Plaintiffs for the very acts for which they are now being charged; . . .
>
> * * *
>
> "Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have apparent personal interest in the matter in controversy. This invades the very core of due process of law.
>
> ". . . It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their prop-

erty, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. Miller v. Aldridge, 212 Ala. 660, 103 So. 835; Mack v. Florida State Board of Dentistry, 296 F. Supp. 1259."

Appellants at pages 16 through 21 of their discussion of "questions presented" state that the District Court has held, the State optometry statute unconstitutional per se. While the Alabama Supreme Court did in *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241 hold it prima facie constitutional, *the question of individual Board members' qualifications to hear specific charges* was not presented or considered. A study of *McCrory v. Wood*, and the opinion of the District Court, shows no conflict. In *McCrory v. Wood*, the Court was not confronted with circumstances of any similarity to the factual situation here presented. The stipulated facts in the instant case clearly show bias, prejudice and a lack of impartiality on the part of the would-be prosecutors, judges and triers of fact.

Appellants question the sufficiency of evidence relating to the finding of bias and argue that the case of *Miller v. Aldridge*, 212 Ala. 660, 103 So. 835, is authority for their contention that Appellees should have pursued the State remedy of mandamus to require recusal of biased or prejudiced members of the State Board of Optometry. Appellees submit that *Miller v. Aldridge* does not preclude jurisdiction of Federal Courts to secure constitutionally protected rights of individuals where such rights are threatened. *Ex parte Young*, 209 U. S. 123; *Boddie v. Connecticut*, ___ U. S. ___, 28 L. Ed 2d 113.

Appellants have compounded and confused the basic issue in this action, which is the right of admittedly qualified optometrists to hold specific private employment, and to pursue a chosen profession free from unreasonable interference and unbiased regulation. It is well settled that this right is a property right protected by the Fifth and Fourteenth Amendments to the United States Constitution. See *United States v. Robel*, 389 U. S. 258; *Konigsberg v. State Bar of California*, U. S. Annotated 6 L. Ed. 2d 1328; *Willner v. Committee of Character and Fitness of the Supreme Court of New York*, 373 U. S. 96, Annotation 2 A. L. R. 3d 1254.

Appellants' admitted refusal to recuse themselves from the trial of Appellees in light of their previous involvment in having the law changed to comply with their objectives to stifle competition, establishes beyond cavil that the prosecution by them of the Appellees to revoke their licenses is no more than another step in the process of securing to themselves a captive, noncompetitive optometric business within the State of Alabama.

Appellees' request for recusal of Appellants before filing of the complaint in this action, and indeed the order and opinion of the District Court, are not based upon the mere fact that Appellees and Appellants share the same profession. Qualification and ethics regulations are not involved. What is involved is actual bias and prejudice on the part of Appellants based upon not only an identifiable and specific economic interest far exceeding the normal competition necessarily existing among all who pursue the same profession, but is also based upon specific actions disclosed by the undisputed evidence before the District Court.

New Jersey State Board of Optometry v. Nemitz, 21 N. J. Super. 18, 90, A. 2d 740 is illustrative of Appellees' position. In this case the New Jersey court in a situation similar to the instant one, found that a Board member, who was in direct competition with the accused optometrist, had made a complaint, had obtained services of a patient to act as investigator, and had provided funds, and had therefore, clearly gone beyond his mere official duties and should have disqualified himself.

This Court has not altered its position as to protection of constitutionally protected rights. See *Boddie v. Connecticut*, ...U. S....., 28 L. Ed. 2d 113, in which the following principle is stated:

> "[11] Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. . . ."

Thus, regardless of the constitutionality of the Alabama statute other and in proper circumstances, the acts of the Alabama State Board of Optometry in the posture and circumstances here involved make the statute unconstitutional when applied to these Appellees as Appellants have applied it.

CONCLUSION

It is respectfully submitted that Appellants, members of the Alabama State Board of Optometry and members of the Alabama Optometric Association, were properly enjoined from conducting hearings on the charges theretofore preferred against the Appellees

and from revoking the licenses of the Appellees to practice optometry within the State of Alabama. Appellants, within the bounds of the present record, present no substantial Federal question requiring further argument. The unanimous decision of the District Court is right.

Respectfully submitted,

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Second Floor, Hill Building
P. O. Box 116
Montgomery, Alabama 36101

DOUGLAS E. BERGMAN
Mercantile Bank Building
Dallas, Texas 75201

Attorneys for Appellees

Of Counsel
HARRY COLE
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
Sep. 3, 1971
JANE P. GORDON,
Clerk

By .....
Deputy Clerk

L. M. BERRYHILL, ET AL,
Plaintiffs,

VS.

THOMAS S. GIBSON, ET AL,
Defendants.

CIVIL ACTION
NO. 3339-N

ORDER

In accordance with the opinion entered this date, it is the ORDER and JUDGMENT of this Court that:

1. The Motion to Dismiss of the Defendants as amended be, and the same is hereby, denied;

2. Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr and Willard Smith, individually and as members of the State Board of Optometry of the State of Alabama and their successors in office as such are hereby restrained and enjoined from conducting a hearing on the charges heretofore preferred

against the Plaintiffs and from revoking the licenses of the Plaintiffs to practice optometry within the State of Alabama;

3. Other relief prayed for by the Plaintiffs in this proceeding be, and the same is hereby, denied;

4. The Cross-Claim of the Defendants be, and the same is hereby, dismissed without prejudice.

DONE this 3rd day of September, 1971.

s/ Robert T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

FILED
Sep. 3, 1971
JANE P. GORDON,
Clerk
By .....
Deputy Clerk

L. M. BERRYHILL, ET AL,
Plaintiffs,
VS.
THOMAS S. GIBSON, ET AL,
Defendants.

CIVIL ACTION
NO. 3339-N

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges

OPINION

VARNER, District Judge:

Plaintiffs in the above cause are licensed optometrists under the state law, Code of Alabama, Title 46 §§190, et seq. In October, 1965, each of the Plaintiffs was employed by Lee Optical Company of Alabama, Inc., or was working on the premises of said corporation in fitting glasses and doing related optometry work in association with the sale by Lee Optical Company, Inc., of glasses to the public. In October, 1965, Plaintiffs were charged by the President of the Alabama Optometric Association with having violated several sections of the Alabama optometry law in a proceeding to be decided by the State Board of Optometry, with the result of suspending or not suspending the licenses of each of the Plaintiffs. The matter of license suspension has been pending since 1965 but has not been actively prosecuted until Plaintiffs were notified in the spring of 1971 by the Board that the matters pending against them would be heard the latter part of May, 1971.

Plaintiffs filed this proceeding requesting a three-judge court to determine the constitutionality of the statute pursuant to which the Alabama Optometric Association seeks suspension of the licenses of the Plaintiffs. Plaintiffs seek an injunction against prosecution of said state proceedings. To this end, a three-judge court has been empaneled. By Cross-Claim, Defendants seek to have this Court revoke Plantiffs' licenses to practice optometry. By agreement, the administrative

prosecution has been suspended pending this proceeding.

Plaintiffs insist that suspension of their licenses would deprive them of the right to seek remuneration from practicing their profession and, therefore, deprive them of their property without due process of law. More specifically, they say the following:

1. That since the individual members of the State Board of Optometry are substantially the same individuals who signed affidavits in 1965 stating, or supporting proceedings charging, that the Defendants (Plaintiffs here) had committed the violations charged in the proceedings, conviction of the offenses charged and suspension of licenses are but predetermined formalities with no element of a fair trial;

2. That the statutes under which Plaintiffs are being prosecuted, as they pertain to the Plaintiffs' rights to appeal from any adverse decision, are unconstitutional, particularly, in providing no method of superseding the suspension of licenses in question pending court review; and

3. That the State Board of Optometry is illegally constituted in that only about one-half of the practicing optometrists of the state may participate in the government of their profession.

The initial question in this case is whether this is such a situation as will require or permit federal intervention to restrain actions of a state court or administrative body. The Supreme Court in several recent cases has indicated federal reluctance to intervene, even to secure federal constitutional rights, in state judicial or ad-

ministrative proceedings unless particular harassment or irreparable injury will result from the state proceeding. The Court in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), held that there is no irreparable injury if the threat to the plaintiff's federally-protected rights can be eliminated by defense of a single criminal prosecution, that "our federalism" ordinarily precludes an injunction against pending state criminal proceedings, and that the federal courts ordinarily should not intervene by injunction even to protect federally-protected rights without any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief, 91 S.Ct. at 755. While dicta in *Younger* may indicate that the rule of that case does not apply in civil cases, no distinction is made between civil and criminal cases by Congress in the anti-injunction, act 28 U.S.C. 2283. However, it has been held that this statute is not applicable to state administrative proceedings. *Engelman* v. *Cahn*, 425 F.2d 954. The case of *Samuels* v. *Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), indicated that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and * * * where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." 91 S.Ct. 25, 768. In the case of *Dyson* v. *Stein*, 401 U.S. 200, 91 S.Ct., 769, 27 L.Ed.2d 781 (1971), a district court's injunctive relief to a person charged under the Texas obscenity statute, on the basis of the district court's conclusion that the statute was unconstitutional, was reversed and remanded since injunctive relief was proper only where irreparable injury was

threatened and there was no irreparable injury found by the district court. In *Perez* v. *Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), the Supreme Court held it was improper to interfere with enforcement of a Louisiana obscenity statute by suppressing evidence held to have been improperly seized, since the plaintiff could present his challenge to the seizure in the state prosecution. In *Byrne* v. *Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971), the Supreme Court reversed a Massachusetts District Court enjoining enforcement of the state statute at the instance of the defendant who was under state court indictment for violation of the statute and remanded the case in the light of *Younger* and *Samuels* since there had been no finding that the threat to the plaintiff's constitutional rights was one that could not be eliminated by his defense against a single criminal prosecution. On the other hand, federal courts will enjoin state proceedings, even in criminal cases, to protect federal rights where irreparable injury is threatened or to prevent continued harassment, *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *Dombroski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Pleadings and uncontradicted evidence in the instant case indicate that Plaintiffs have been actively practicing their professions since prior to 1965 and that the cases against them have been pending since that time, that the individuals who will act as judges of their cases are largely the same individuals who in 1965 supported prosecution of Plaintiffs for the very acts for which they are now being charged; that the statutes under which they are being prosecuted provide no precautions against the Board's acting as investigator, prosecutor, and judge all in the same case and provide

for no supersedeas of suspension of license, pending an appeal; and that the organization charged with judging the ethics of Petitioners and with possibly suspending their licenses, is the State Board of Optometry, a board selected from the state's 100 private practitioners of optometry who must govern the state's 192 optometrists, of whom about 92 work for some other person or entity.

The Alabama Optometric Association is a corporation formed by, and whose membership is limited to, private practitioners of the profession of optometry whose services are available to the public. The State Board of Optometry is an unincorporated Board created pursuant to Code of Alabama, Title 46, §192, and is appointed by the Governor from members in good standing of the Alabama Optometric Association. In Alabama, approximately 100 practicing optometrists are in private practice of optometry and their services are available to the public while approximately 92 optometrists are employed by other persons or other entities. By virtue of the rules of the Association, the employed optometrists may not be members of the Association, and by virtue of said Section 192, no person other than members of the Association may serve on the State Board of Optometry. It follows, therefore, that no optometrist, employed by any other person or entity, may serve on the State Board of Optometry and that, therefore, 92 of the state's 192 practicing optometrists have no right to participate in the government of their own profession.

Code of Alabama, Title 46, §206, provides authority for suspension or revocation of the license to practice optometry within the State of Alabama by the State

Board of Optometry for certain causes in addition to those causes heretofore excluded by the Supreme Court of Alabama in *McCrory* v. *Wood*, 277 Ala. 426, 171 So.2d 241.

The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. A basic element of justice in America is that the court must avoid, not only evil but, the appearance thereof. The Supreme Court of the United States in *Re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623, wrote the following:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749, 758, 47 S.Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to

perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11."

In the instant case, there is evidence that those who are to judge the matters of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs worked, issued over 75,000 eyeglasses in one year. Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business. Plaintiffs argue that the suspension of licenses of the Plaintiffs is but a matter of form and that, when the same are suspended, no supersedeas being provided, the Plaintiffs will be deprived of an opportunity to practice their profession until relief can be secured from the courts of the State of Alabama.

Supersedeas is within the power of the court without statutory authority therefor. *Huett* v. *Nevins*, 50 So.2d 160, 255 Ala. 37; *Campbell* v. *Byers*, 60 So. 737, 6 Ala.App. 292. Appeal from a judgment, when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends the judgment without such a bond. *Ex Parte Cudd*, 195 Ala. 80, 70 So. 721; *Riley* v. *Wilkinson*, 25 So.2d 384, 247 Ala. 579. Note the evolution of the law associated therewith discussed at 4 Am.Jur. 2d 839, Appeal and Error, §365.

Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have apparent personal interests in the matter in controversy. This invades the very core of due process of law.

Revocation of the license of a professional man to practice his profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the Plaintiffs. No method is provided under the state law to avoid this irreparable damage. There is no necessity for exhausting state administrative remedy unless that remedy would be adequate. *Kelly* v. *Board of Education*, 159 F.Supp. 272. It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. *Miller* v. *Aldridge*, 212 Ala. 660, 103 So. 835; *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp 1259.

We turn now to the counterclaim of the Defendants. This matter was not called to the Court's attention at the pretrial hearing and no issue was formulated thereon in the pretrial order. That order limits the issues and controls the course of the action unless modified to prevent manifest injustice, Rule 16, Federal Rules of Civil Procedure. The counterclaim would be no more than a permissive counterclaim as distinguished from a compulsory counterclaim, *Big Cola Corp.* v. *World Bottling Co.*, 134 F.2d 718; *Weber* v. *Weber*, 44 F.R.D. 227; *Non-Ferrous Metal, Inc.* v. *Saramar Aluminum Co.*, 25 F.R.D. 102; *American Samec Corp.* v. *Florian*, 9 F.R.D. 718. We, therefore, conclude that no manifest injustice would result from failure to consider the counterclaim and that the same should be dismissed.

This 3rd day of September, 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, et al. Plaintiffs Vs. THOMAS S. GIBSON, et al, Defendants	CIVIL ACTION NO. 3339-N

STIPULATION

It is stipulated by and between the parties as follows:

1. Paragraphs 2, 3 (a), 3 (c), 4, 5 and 6 are admitted by all of the parties, both plaintiff and defendant.

2. At the time notice of the August 1970 hearings were given plaintiffs demanded that the respondent State Board of Optometry recuse itself, a copy of the demand being attached hereto as Exhibit 1. Subsequently the August hearing was postponed by mutual agreement of the plaintiffs and defendant State Board

with the stipulation that neither party's position would be altered by so doing. This agreement is set out as Exhibit 2.

3. Plaintiff optometrists are all licensed, practicing optometrists in the State of Alabama. In October of 1965 when the original charges were preferred against them, they were all employees of Lee Optical Company of Alabama, Inc., a corporation. Lee Optical Company of Alabama, Inc. is a corporation engaged in the business of optical dispensing. It sells eyeglasses at an advertised price. Prior to October 1965 Lee advertised eyeglasses, advertised that it *conducted* or *furnished* eye examination by a registered optometrist on its premises. Exhibit 3 depicts advertisements and photographs of Lee's premises showing the advertising conducted upon its premises. The optometrists employed in the Lee stores were employed on a salary. No charge was made for eye examinations except instances where the patient did not need eyeglasses. In those instances a nominal charge was made for the examination which went into Lee's receipts with the optometrist getting no part of it. A copy of the employment contract in use between Lee and its optometrists at the time of the filing of the charges against the Lee optometrists is attached hereto as Exhibit 4 with deposition testimony of Dr. William B. McCrory who identified the employment contract.

4. In October of 1965 Lee modified its advertising program by taking out of any advertisements any references to optometrical examinations or optometric services. Its ads were directed toward the advertisement of eyeglasses. A copy of the ad in use which is typical of those used since October 1965 is attached hereto as Exhibit 5. The store windows of Lee Optical do not

contain any reference to an optometrist or that an optometrical examination is available inside the store.

5. In April 1970 Lee entered into a new agreement with its optometrists, a copy of which is attached hereto as Exhibit 6. This agreement in substance allowed the optometrist to lease the optometrical office and equipment from Lee, to occupy the space therein for the purpose of conducting eye examinations and to set his fee. Arrangements were made whereby the Lee clerical help collects the fees which are charged, posts them on a balance sheet and Lee remits the fees to the optometrist. There is no other pecuniary arrangement between the optometrist and Lee. All pension plans, withholding tax arrangements, group insurance plans and other employee benefits which had been available to the optometrists through Lee were discontinued as of April of 1970.

Under the present arrangements the optometrist conducts examinations in the leased premises within the Lee Optical dispensary. He does not pay any rent. The consideration to Lee is the availability of an optometrist to examine eyes of patients who come in without prescriptions for glasses. Lee receives no part of the fee for the optometric examination and the optometrist receives nothing from Lee by way of remuneration because of the sale of a pair of eyeglasses. The additional examination fee is now paid by the customer who comes in.

The optometrists in the Lee Optical stores do not advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

6. Defendants Gibson, Ashbee, Carlton, Warr and

Smith, members of the State Board of Optmetry of the State of Alabama are also members of the Alabama Optometric Association. Dr. Thomas S. Gibson was a member of the Legislative Committee of the State Association in 1965 and also a member of the Board of Optometry. As President of the Board of Optometry he signed the complaint in a civil suit, the complaint in which is attached as Exhibit 7 by which he made affidavit as to the truth of certain charges against plaintiffs. Board members at the time of the filing of the complaint against plaintiffs were defendants Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Willard Smith and James L. Cash.

7. The Alabama Optometric Association consists of approximately 100 members. The dues paid by each member are $240 per year; of this $140 goes to the American Optical Association. These dues are used to finance the Association's activities and also to defray legal expenses of investigating and initiating charges against plaintiffs in this action. The Alabama Optometric Association has for several years been interested in eliminating "corporate practice" which the plaintiffs are alleged to be engaged in by being employed by Lee Optical Company or *by practicing on its premises.* In 1965 the Alabama Optometric Association was active in securing the repeal of Section 210 of Title 47 of the Optometry Code of the State of Alabama. This was the section which allowed and required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Defendants Gibson, Carlton, Smith, Ashbee and Warr contributed to a legislative fund raised by the Alabama Optometric Association to promote the repeal of these sections, the

repeal of which allegedly makes the practice of plaintiffs illegal.

8. The State Board of Optometry has no rules or regulations governing the practice of optometry within the State of Alabama. The charges pertaining to the plaintiffs in this instance involve an alleged violation of the State Code regulating the practice of optometry as it presently exists.

9. It is stipulated by and between the parties that Section 210 of Title 47 was repealed August 4, 1965, that charges were initiated by the Alabama Optometric Association against plaintiffs and filed with the State Board October 23, 1965, a copy of the said charges made against each optometrist being the same as Exhibit 8 hereto made against Dr. Harry Sparks, that civil suit was filed by the State Board against plaintiffs and Lee Optical on October 25, 1965, a copy of the complaint and exhibits thereto being attached as Exhibit 7.

10. Attached to the original of this stipulation are depositions of Dr. William B. McCrory and members of the State Board of Optometry taken May 21 and 22, 1970 and it is stipulated that the parties would so testify in this action.

11. It is further stipulated by and between the parties that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

12. It is further stipulated that each of the plaintiffs, if called to testify, would testify that Lee Optical Company of Alabama, Inc. had never interferred with

his professional practice, called upon him to alter his judgment and that his professional judgment was in no way affected or impaired, nor was his allegiance to his patients impaired or affected by reason of the fact that he practiced on the premises of a dispensing optician.

13. Mr. Gene Shanbaum of Dallas, Texas, Secretary of Lee Optical Company, testified in the trial of *State Board* v. *Lee* in the Circuit Court of Montgomery County that he had checked the records of Lee Optical and that in 1969 Lee sold 75,000 pairs of glasses in Alabama.

14. The Alabama Legislature created the School of Optometry in 1968 to be located in the Medical Complex of the University of Alabama at Birmingham and it is now in its second year of teaching optometry students.

15. Drs. Pillion and Sparks, who had formerly been employees of Lee and now practice as lessees on Lee's premises, testified in the *State Board* v. *Lee* trial that they made more money as lessees of Lee under their present arrangement than they had as a salaried employee for Lee.

16. Dr. Milton E. Warr was appointed to the State Board of Optometry on or about January 1, 1971 and prior to that time had no contact with the charges against the plaintiffs or the suit against Lee Optical Company.

17. The employment agreement which Lee had with its optometrists prior to April of 1970 and the lease arrangement presently in use both contain a 10 day cancellation clause.

18. If called to testify Dr. George R. Carlton, a

member of the State Board, will testify that by-laws of the Association provide that the Association recommend names to the Governor for appointment to membership on the State Board. The Association in years past has made this recommendation, but has rarely been followed by the Governor. In recent years no recommendation has been made. None of the present Board members were recommended by the Association for appointment. There is no provision in the optometry law which allows the Association to nominate Board members.

19. There is no provision in the optometry laws or elsewhere for the appointment of a new Board if the present Board is enjoined from hearing pending charges.

20. The House of $8.50 Eyeglasses has now been decided by the Circuit Court in Birmingham and is in the process of being appealed; a copy of the Circuit Court decree is attached as Exhibit 9.

21. Section 210 of the optometry law was repealed on August 4, 1965. There was no change in the signs and advertising done in all the Lee stores until after the charges here involved were filed on October 23, 1965 and the suit filed against Lee and its optometrists several days later.

22. The State Board of Optometry adopted Resolution No. 1 on June 13, 1971; a copy of the Resolution being attached hereto as Exhibit 10.

23. All exhibits attached to pleadings, briefs or other documents heretofore filed with the court are admitted as to genuineness and what they purport to be for the convenience of the court; however, by admis-

tion of documents of this stipulation, neither of the parties admit the relevance thereof as to the issues.

s/ Douglas E. Bergman
Douglas E. Bergman

s/ Harry Cole
Harry Cole
Attorneys for
Plaintiffs

s/ J. G. L. Marston III

s/ Donald G. Valeska II
Deputy Assistant
Attorneys General

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.
Attorney for
Defendants

APPENDIX C

§ 192. (2875) State board of optometry; how constituted.—The governor shall appoint a state board of optometry consisting of five persons each of whom shall be a citizen of the United States, over the age of twenty-five years, a member in good standing of the Alabama optometric association, incorporated, or its legal successor, and shall have been engaged in the actual continuous practice of optometry in the State of Alabama for at least five years next preceding his appointment. One member of said board shall be appointed each year for the term of five years and shall hold office until his successor is appointed and qualified. The governor may remove from office at any

time any member of the board for neglect of duty, incompetency, improper or unprofessional conduct, or when the license or certificate of any member has been suspended or revoked. Vacancies on said board shall be filled by appointment by the governor in the manner hereinbefore provided. The governor shall furnish each member of said board at the time of his appointment a certificate of appointment, and each appointee shall qualify by taking the usual oath of office before the judge of probate of his home county within fifteen days from date of his appointment. (Ib.)

§ 206. (2889). License may be suspended or revoked.—A license issued to any person may be suspended for a definite period of time, or revoked by the state board of optometry for any of the following reasons; to-wit: Conviction of any offense involving moral turpitude, in which case, the record of conviction, or a certified copy thereof certified by the clerk of the court or by the judge in which court the conviction is had, shall be conclusive evidence of such conviction. For unprofessional conduct. "Unprofessional conduct" shall be defined to mean any conduct of a character likely to deceive or defraud the public, lending his license by any licensed optometrist to any person, the employment of "cappers", or "steerers" to obtain business, "splitting" or dividing a fee with any person or persons, the obtaining of any fee or conpensation by fraud or misrepresentation, employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work, by use of any advertising, carrying the advertising of articles not connected with the profession, the employment of any drugs or medicines in his practice unless authorized to do so by the laws covering the practice of medicine of this state, or

the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice. When a license or certificate has been obtained by fraud practiced on the board. When the holder of a license or certificate is suffering from a contagious or infectious disease. Gross incompetency. Intemperance in the use of intoxicating liquors or narcotics to such an extent as unfits the holder of the license for the proper practice of optometry. Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same, and a copy of the charges, which must be made in writing, and verified by oath, together with a notice of the time and place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be affected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the person or persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of licenses as herein provided for, the holder may appeal

to the circuit court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked resides. (Ib.)

APPENDIX D

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
IN EQUITY
NO. 36715

STATE BOARD OF OPTOMETRY,

Complainant,

v.

LEE OPTICAL COMPANY OF ALABAMA, INC.
a corporation and

Dr. L. M. Berryhill, O. D.
Dr. Richard T. Wood, O. D.
Dr. William B. McCrory, O. D.
Dr. Franklin H. Pearce, O. D.
Dr. J. T. Dumas, O. D.
Dr. B. J. Fitzsimmons, O. D.
Dr. William Baya, Jr., O. D.
Dr. James J. Couch, O. D.
Dr. James A. Miller, O. D.
Dr. Howard W. Smith, O. D.
Dr. J. Harry Sparks, O. D.
Dr. O. L. Wilson, O. D.
Dr. L. Graze, O. D.
Dr. William J. Craig, M. D.

Respondents

BILL OF COMPLAINT

Comes now the State Board of Optometry and respectfully shows unto the Court the following facts:

1. That the State Board of Optometry was created in Alabama pursuant to Section 192 of Title Chapter 11, 1940 Code of Alabama of the Alabama Optometry Law and that Dr. Thomas S. Gibson, Huntsville, Alabama is President and Dr. Willard Smith, Eufaula, Alabama is Secretary and Dr. James L. Cash, Selma, Alabama and Dr. George W. Posey, Jasper, Alabama and Dr. George R. Carlton, Alexander City, Alabama and all constitute the duly appointed and qualified members of the State Board of Optometry.

2. That said State Board of Optometry is authorized to hold examinations and grant licenses to practice optometry in Alabama and brings this action for injunction pursuant to the Alabama Optometry Laws, Title Chapter 11, Sections 190-213, inclusive, 1940 Code of Alabama and the laws of the State of Alabama.

3. That the Lee Optical Company of Alabama, Inc., is an Alabama corporation with its Declaration of Incorporation filed in the Probate Court of Montgomery County, Alabama. That the said Lee Optical Company of Alabama, Inc., operates some fourteen (14) stores throughout Alabama all under the trade name of "Lee Optical" one of which is at 6 Dexter Avenue, Montgomery, Alabama. For ease of reference the respondent Lee Optical Company of Alabama, Inc. will at times be henceforth referred to as Lee Optical.

4. The respondents Dr. L. M. Berryhill, O. D., 6 Dexter Avenue, Montgomery, Alabama; Dr. James J. Couch, O. D., 110 So. Court St, Florence, Alabama;

Dr. Richard T. Wood, O. D., 100 Washington Street, S. E., Huntsville, Alabama,; Dr. William B. McCrory, O. D., 100 Washington Street, S. E., Huntsville, Alabama; Dr. Franklin H. Pearce, O. D., 2306 Memorial Parkway, S. W., Huntsville, Alabama; Dr. J. T. Dumas, O. D., 322 S. Wilson, Prichard, Alabama; Dr. B. J. Fitzsimmons, O. D., 203 Dauphin Street, Mobile, Alabama; Dr. William Baya, Jr., O. D., Springdale Plaza, Mobile, Alabama; Dr. James A. Miller, O. D., 203 Dauphin Street, Mobile, Alabama; Dr. Howard W. Smith, O. D., 206 19th Street, Bessemer, Alabama; Dr. J. Harry Sparks, O. D., 3221 Avenue W (Ensley), Birmingham, Alabama; Dr. O. L. Wilson, O. D., 9121 4th Avenue So., Birmingham, Alabama (Roebuck); Dr. L. Graze, O. D., 212 No. 20th Street, Birmingham, Alabama; Dr. William J. Craig, M. D., 115 No. Foster, Dothan, Alabama, and all of these said respondents have an agreement with the respondent Lee Optical Company of Alabama, Inc., pursuant to which said respondents are located in the various stores owned and operated by the respondent, Lee Optical Company of Alabama, Inc. in the towns and at the addresses immediately shown above and pursuant to said agreement, the exact terms of which are unknown to complaint, these respondents are each in one of the stores operated by the respondent, Lee Optical Company of Alabama, Inc., and under the trade name Lee Optical, for the express purpose of examining the eyes of customers coming into each of said stores and the sale and fitting of glasses to said customers. All of said above named respondents are interested parties and will be adversely affected by a decree in this suit.

5. The complainant, State Board of Optometry, further shows unto the Court that the Alabama Legis-

lature adopted House Bill No. 205 which was signed by the Governor on August 4, 1965 at 11:59 A. M. at which time it became law and said House Bill No. 205, among other things, repealed Section 210 of the Optometry Law as found in Title Chapter 11, 1940 Code of Alabama. Said Section 210 as repealed reads as follows:

> "Nothing in this chapter shall be so construed as to prevent any person firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation."

Upon the repeal of said Section 210 and upon the signing of House Bill No. 205 by the Governor, there no longer exists any legislative authority for the respondent, Lee Optical Company of Alabama, Inc., through its numerous stores operated under the trade name of "Lee Optical", to continue operating said stores wherein eyes are examined or glasses fitted.

6. The complainant further shows the Court that promptly following the signing of House Bill No. 205 by the Governor the State Board of Optometry directed its Secretary, Dr. Willard Smith, to notify all optometrists in Alabama of the passage of House Bill No. 205 which repealed Section 210 of the Alabama Optometry Law. Said letter was sent by certified mail, return receipt requested, and said letter together with copy of House Bill No. 205, which is now Act number 218 are attached hereto as exhibits No. 1 and No. 2 and made

a part hereof. Complainant further shows that each of the optometrists named above as respondents herein received a copy of said letter, Exhibit 1 and the enclosure Exhibit No. 2.

7. Complainant would further show that the respondent Lee Optical Company of Alabama, Inc., is not authorized to practice optometry in Alabama through its numerous stores or otherwise but nevertheless advertises that through its "Lee Optical" stores it conducts eye examinations, prescribes, furnishes and fits eyeglasses and holds itself out as practicing optometry all as shown by the picture taken on or about September 29, 1965 of the Lee Optical Store front at 6 Dexter Avenue, Montgomery, Alabama and on the left front window of said store appears the phrase "Eyes examined Glasses Fitted" all as shown in said picture which is attached hereto as Exhibit No. 3 and made a part hereof. Additionally there is a sign in said store which states that the one price of $12.90 includes, among other things, "Your scientific eye examination", all as shown by a picture of said sign taken on or about September 29, 1965 and attached hereto as Exhibit No. 4 and made a part hereon Complainant further shows that respondent through its numerous stores advertises by newspaper, radio and television since August 4, 1965 that it conducts scientific eye examinations as shown by the advertisement appearing on September 10, 1965 in the Florence Times advertising the Lee Optical Store in Florence, Alabama. Said newspaper advertisement is attached hereto as Exhibit No. 5 and made a part hereof.

8. Complainant would further show that said pictures of the Lee Optical Store in Montgomery, Ala-

bama are typical and similar to the store fronts of the other Lee Optical Stores in Alabama and that the newspaper advertisement advertising the Lee Optical Store at Florence, Alabama attached as Exhibit No. 5 is typical and similar to newspaper advertisements of the other Lee Optical Stores in Alabama and complainant will have additional proof as to each and every one of said Lee Optical Stores in Alabama to present on the trial of this cause in support of its allegation that since August 4, 1965 at 11:59 A. M. the respondent Lee Optical Company of Alabama, Inc. is unlawfully practicing optometry in all of its stores in Alabama.

9. Complainant would further show that Lee Optical Company of Alabama, Inc. has contracts of employment, agreements or arrangements with all of the other respondents named above, the exact content and provisions of which are unknown to the complainant but the complainant alleges and verily believes that the same is a scheme, device or arrangement to enable the respondent, Lee Optical Company of Alabama, Inc. to directly or indirectly engage in the practice of optometry unlawfully in the State of Alabama; the complainant further alleges and verily believes that the respondent, Lee Optical Company of Alabama, Inc., pursuant to said scheme, device or arrangement has one of the above named respondent optometrists or physicians present in its said "Lee Optical" stores throughout the State of Alabama for the express purpose of examining the eyes of the customers of the "Lee Optical" stores with resultant sales of eyeglasses on prescriptions issued by said optometrist or physician which sales are either made by the respondent, "Lee Optical", or the said "Lee Optical" receives a commission or some financial profit from same, the exact nature or amount of

which is unknown to the complainant. Complainant further alleges that all sales of glasses are made on sales slips which bear the name of the respondent, Lee Optical; complainant further alleges and verily believes that said optometrists and physicians after making an examination of the customer's eyes and finding that glasses are necessary, will not give to the patient a prescription for the needed eyeglasses which the customer would be free to take to some place of his own choice to have filled, but instead, said doctor insists and demands that any glasses so prescribed by him must be purchased from and sold by the respondent, "Lee Optical". Complainant further alleges and verily believes that the said doctor and each one of the Lee Optical stores make no charge to each said customer for his examination of the eyes of the customers of the respondent, Lee Optical, but that his compensation or remuneration for his services is derived from a contract of employment or some arrangement, unknown to the complainant, whereby he and the respondent, Lee Optical, in some way split or divide the amount charged for eyeglasses sold by the respondent, Lee Optical.

10. The complainant further alleges that the respondent doctors as named above are unlawfully aiding and abetting the respondent, Lee Optical Company of Alabama, Inc. and the individual "Lee Optical" stores served by each and making it possible for the said respondent, Lee Optical Company of Alabama, Inc. to unlawfully practice optometry through its various "Lee Optical" stores throughout the State of Alabama. Section 208 of the Alabama Optometry Law does not authorize a physician, surgeon or oculist to unlawfully engage in the practice of optometry but merely permits

him to lawfully engage in that profession on the faith of his license as a physician.

11. Complainant further alleges that the doctors named above are each practicing optometry under a false or assumed name to-wit: "Lee Optical" in the store that each serves in violation of Section 191 of the Alabama Optometry Law.

12. Complainant further alleges that the doctors named above are soliciting the sale of eyeglasses in violation of Section 203 of the Alabama Optometry Law through the advertising campaign and store signs as presently conducted in behalf of himself and the "Lee Optical" store he serves.

13. Complainant further alleges that the doctors named above are guilty of unprofessional conduct as defined by law in Section 206 of the Alabama Optometry Law in that they are lending their licenses to the "Lee Optical" stores they serve and each one of the doctors named above is employing the "Lee Optical" store as cappers and steerers to obtain business and further the doctors named above are guilty of unprofessional conduct as defined by law in Section 206 of the Alabama Optometry Law in splitting or dividing their fees with the "Lee Optical" store they serve.

14. Complainant further alleges that when a prospective purchaser is drawn into the "Lee Optical" stores by said previously described advertisements, the patient is ushered into the office of the said doctor serving each "Lee Optical" store which is in and a part of the establishment conducted by "Lee Optical" and he makes an examination of the eyes of said patients and writes a prescription for glasses then "Lee Optical"

through its servants, agents and employees and with the help and assistance of the doctor serving the store, immediately attempt to make a sale of eyeglasses to said patient. That as a result of said arrangement, scheme or device the public is misled and deceived into believing that the said "Lee Optical" is qualified to make eye examinations and is in fact conducting and making eye examinations and prescribing glasses as well as selling same and the respondent doctors named above participate in perpetrating said fraud and deception.

15. That as a result of the above alleged acts and their willful, continued and unlawful conduct on the part of the respondents, and each of them, great and irreparable injury will result to the public health and welfare in the State of Alabama unless the respondents, and each of them, are enjoined and prohibited from the unlawful practice of optometry, either directly or indirectly, and the respondent, Lee Optical Company of Alabama, Inc., from employing registered optometrists or physicians, surgeons, or oculists by any means or arrangement, to examine the eyes of the customers of the "Lee Optical" stores they operate throughout the State of Alabama.

16. That as shown above the complainant does not have a plain, speedy, adequate and complete remedy at law.

Wherefore premises considered, the complainant prays that this Honorable Court issue a prohibitory injunction enjoining and prohibiting each of the respondents named herein from the unlawful practice of optometry, either directly or indirectly in the State of Alabama and the respondent Lee Optical Company of Alabama, Inc., from employing by any means or ar-

rangement registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and prescribe eyeglasses for their "Lee Optical" stores or any other stores owned by it anywhere in the State of Alabama. Complainant also prays for process and for general relief, submits to the jurisdiction of the Court and offers to do equity.

/s/ Thomas S. Gibson
Thomas S. Gibson, O. D.
President
State Board of Optometry

Thomas F. Parker
Theodore H. Hoffman
Richard A. Billups, Jr.

/s/ Thomas F. Parker
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STATE OF ALABAMA
MONTGOMERY COUNTY

Before the undersigned, notary public, in and for said County and State personally appeared Dr. Thomas S. Gibson, President, State Board of Optometry, who after being duly sworn, deposed and said that the al-

legations contained in the foregoing complaint are true and correct and acknowledged that he signed the complaint voluntarily this the 23rd October, 1965.

/s/ Thomas F. Parker
Notary Public

APPENDIX E

AFFIDAVIT

I, Dr. Roy C. Adams, Optometrist, Monroeville, Alabama, after first being sworn under oath state as follows:

I am a registered optometrist in Alabama and have practiced my profession at Monroeville, Alabama for a number of years. I am and have been since I started to practice a member in good standing of the Alabama Optometric Association.

I was elected president of the Alabama Optometric Association in 1964 and served in various official capacities in the Association prior to that time.

Upon the repeal of Section 210 of the Optometry law in 1965, the Association wrote a letter to all optometrists advising of this and offered their help to all employed optometrists in optical departments in establishing their own independent professional practice any place they chose in Alabama. No one accepted our help and continued to operate as they had prior to the repeal of Section 210.

After several weeks had passed the Alabama Optometric Assoocation decided to start investigating and gathering evidence to show how these employed optom-

etrists and their employers were not complying with the optometry law as amended. This was done by and at the expense of the Association, its officers and attorneys. The State Board of Optometry took no part in this whatsoever.

After our investigation and evidence gathered showed Lee Optical Company and its employed optometrists to be doing the same as before and what appeared to be in flagrant violation of the amended optometry law, we instructed our attorneys to prepare an injunction suit against Lee Optical Company, as well as others so engaged, and their employed optometrists and also to prepare charges against the employed optometrists setting forth their violation of applicable sections of the optometry law and when this was done, and upon advice of counsel, I signed the charges on October 23, 1965, and they were transmitted to the State Board of Optometry for such action they felt should be taken. At no time did I as president of the Alabama Optometric Association try to dictate what action it should take.

Our attorneys felt the evidence justified the filing of an injunction suit against Lee Optical Company and their employed optometrists—so one was prepared and presented to the State Board of Optometry for their consideration and it was later filed. At no time did I as president of the Alabama Optometric Association try to dictate to the Board that they had to file such an injunction suit or did any one else to my knowledge. The suit was filed voluntarily by the State Board.

Dated this the 2nd day of June, 1971.

s/ Roy C. Adams, O.D.
ROY C. ADAMS, OD

Sworn and subscribed before me the undersigned authority, this the 2nd day of June, 1971.

s/ Bruce H. Hood
NOTARY PUBLIC

FILE COPY

FILED

MAY 8 1972

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-653

THOMAS S. GIBSON, ET AL.,
Appellants,

VERSUS

L. M. BERRYHILL, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

SUPPLEMENT TO JURISDICTIONAL STATEMENT
(Late Authorities—Rule 41)

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Date: May _____, 1972

UNDERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

AUTHORITIES

CASES:

Geiger, Dr. Hugh S., Jr. v. Dr. B. H. Jenkins, President of the State Board of Medical Examiners of Georgia, et al., 316 F. Supp. 370 ..... 4, 5-9, 9

Henry v. Claiborn Hardware Co., 444 F.2d 1300 (decided June 23, 1971) 3, 10

State v. Keel, Ala., 35 So.2d 625 9

STATUTES AND MISCELLANEOUS:

28 U.S.C.A. 2283 ..... 5, 10

Georgia Optometry Law, Sec. 84-1110 4

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(Late Authorities—Rule 41)

INTRODUCTORY PARAGRAPH

This Supplement to the Jurisdictional Statement, now pending before this Honorable Court, is filed pursuant to Rule 41 in order to invite attention to late decisions we believe will be helpful to the Court.

STATEMENT

The optometrists employed by Lee Optical Company of Alabama, Inc. (hereinafter referred to as Lee Optical) are the plaintiffs below and appellees in this appeal and for ease of reference will be referred to hereafter as plaintiffs.

The State Board of Optometry, defendant below, together with the members of the State Board and other named defendants will be hereafter referred to as defendants and the State Board of Optometry will be referred to as State Board.

In order to make this Statement more meaningful and to pinpoint the question involved, we invite the Court's attention to the following found in the opinion of the trial court:

> "The initial question in this case is whether this is such a situation as will require or permit federal intervention to restrain actions of a state court or administrative body. The Supreme Court in several recent cases has indicated federal reluctance to intervene, even to secure federal constitutional rights, in state judicial or administrative proceedings unless particular harassment or irreparable injury will result from the state proceeding. The Court in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), held that there is no irreparable injury if the threat to the plaintiff's federally-protected rights can be eliminated by defense of a single criminal prosecution, that 'our federalism' ordinarily precludes an injunction against pending state criminal proceedings, and that the federal courts ordinarily should not intervene by injunction even to protect federally-protected rights without any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief, 91 S.Ct. at 755. While dicta in *Younger* may indicate that the rule of that case does not apply in civil cases, no distinction is made between civil and criminal cases by Congress in the anti-injunction act, 28 U.S.C. 2283. However, it has been held that this statute is not applicable to State administrative proceedings, *Engleman* v. *Cahn*, 425 F.2d 954."

The State Board (appellants) cited the case of *Henry* v. *Claiborn Hardware Co.*, 444 F.2d 1300 (decided June 23, 1971), wherein the 5th Circuit Court of Appeals had reversed the lower court and dissolved the injunction and directed dismissal which would send the case back for trial in state court. This suit was instituted in federal court upon the filing of the case in state court. This was on appeal when our Jurisdictional Statement was filed. We urged that this *Henry* case, as well as others cited, supported the Motion to Dismiss as filed by the State Board and reversal of the injunction granted by the trial court.

This appeal has now been acted upon by this Honorable Court as indicated in 40 L.Wk. 3469 on March 27, 1972, as follows:

> "The petition for a writ of certiorari is denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition."

This action on this appeal sent the *Henry* case back to the state court for disposition just as the State Board has urged throughout the entire proceedings of this pending case, to-wit: for hearings before the State Board or for such action in state court as Lee Optical (appellees) felt warranted.

There is another recent case in which both the three-judge trial court and this Honorable Court reach an opposite conclusion based on the facts, procedure and law identical to those in the case at bar and dismissed the suit filed in federal court.

The case of *Dr. Hugh S. Geiger Jr.* v. *Dr. B. H. Jenkins, President of the State Board of Medical Examiners of Georgia, et al.*, 316 F.Supp. 370, involved charges filed before the State Board of Medical Examiners. The procedures for handling such charges and a hearing before the Board are the same as those of Section 206 under attack in this case. The Georgia Optometry Law, Sec. 84-1110, is as follows:

"84-1110. Refusal and revocation of certificates of registration; grounds; hearing; appeal.—The Board of Examiners in Optometry shall refuse to issue its certificate of registration and may revoke its certificate of registration issued to any person who is not of good moral character, or who commits an act involving moral turpitude, or who is guilty of highly unprofessional conduct, or whose certificate was issued through error, fraud, or perjury: Provided, that in all such cases the board shall serve written notice of the charges on such accused person at least 10 days prior to the date set for hearing, and said person shall be notified to appear before the board to answer the charges at such time and place as the board may direct. Such notice shall plainly set forth the charges made, and notify the accused person to appear to answer the same. On such hearing, if the charges are found true, the accused having the right to produce witnesses in his behalf and cross-examine those testifying against him, the board shall render judgment after such hearing, and the person accused may enter an appeal to the next superior court of the county in which the hearing is held, if he is dissatisfied with the finding, such appeal to be governed by the law relating to appeals in other cases.

"(Acts 1933, pp. 202, 203.)"

Section 206 of the Alabama Optometry Law is shown on page 4 of our Jurisdictional Statement and in full as Appendix B. An examination of Section 206, dealing with the handling of charges, and those described in *Geiger* will show them to be virtually the same in every respect.

In the *Geiger* case, *supra,* the three-judge trial court held the pending charges to be penal in nature and subject to the prohibition of the Federal Anti-Injunction statute, 28 U.S.C.A. 2283, just as interference with state criminal proceedings were prohibited, and dismissed the case since the charges before the Board were pending at the time the Federal Injunction suit was filed. We feel this case to be of such importance in passing on the plea of the State Board to reverse the trial court herein and dismiss this case, we quote as follows from the *Geiger* case, *supra* (later upheld by this Honorable Court as we will show).

> "This action for damages and for declaratory and injunctive relief is brought under 28 U.S.C. § 1343 for claims allegedly arising under 42 U.S.C. §§ 1983, 1985, and 1988. An injunction against the enforcement of the state statute which regulates revocation of licenses to practice medicine (Ga.Code Ann. § 84-916) is sought on the ground that the statute is unconstitutional on its face, and a three-judge court has been convened pursuant to 28 U.S.C. § 2281.
>
> "Plaintiff is a medical doctor who has been licensed to practice medicine in the State of Georgia since shortly after his graduation from Emory University Medical School in June 1950, and who has practiced in this State continuously since June 1, 1956. Defendants are members of the State Board of Medical Examiners of Georgia, certain named employees of that board, certain named members of the East Point Police Department, an investigator for the District Attorney of

Fulton County, and certain private individuals who allegedly acted in concert with the named state officials.

"The record shows that on February 18, 1970, the Board of Medical Examiners issued to plaintiff a notice that the Board had been presented with charges that plaintiff had engaged in conduct which might constitute grounds for suspension or revocation of his license to practice medicine. The charges were based on affidavits which were attached to the notice. In general, plaintiff was charged with having solicited, committed, or otherwise participated in acts of sodomy, unlawful sales of dangerous drugs, use of stolen credit cards, theft by receiving stolen property, and various other unlawful acts. The notice stated that a hearing on these charges would be held on March 11, 1970, and plaintiff was informed of his right to controvert the charges, to raise any defenses he wished, to be represented by counsel at the hearing, to respond and present evidence on any relevant issue, and to subpoena witnesses and documentary evidence through the State Board of Medical Examiners. On March 10, 1970, plaintiff filed the instant suit and on May 11th a hearing was held before the three-judge court, after which the parties were allowed additional time within which to file briefs.

"The gist of his attack upon the statute appears to be that it is vague and overly broad on its face and that it gives to the Board of Medical Examiners unfettered discretion to suspend or revoke licenses to practice medicine. For the reasons set forth below we do not reach the merits of plaintiff's contentions with respect to the statute and the complaint will be dismissed on other grounds.

"[1, 2] First, since state proceedings were pending in the state courts and before the Medical Board at the

time plaintiff came into federal court, and since it is those proceedings with which plaintiff asks this Court to interfere, the anti-injunction statute, 28 U.S.C. § 2283,[1] precludes the granting of either declaratory or injunctive relief. *See* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); Brooks v. Briley, 274 F.Supp. 538 (N.D. Tenn. 1967), aff'd. per curiam, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647 (1968).[2]

"Federal courts must look to the law of the State to determine whether proceedings which were pending when suit was brought were judicial in nature. Hill v. Martin, 296 U.S. 393, 56 S.Ct. 278, 80 L.Ed. 293 (1935). Under Georgia law the statute which regulates revocation of licenses to practice medicine is a penal statute and the revocation proceedings themselves are in the nature of criminal proceedings. *See* Hughes v. State Board of Medical Examiners, 158 Ga. 602, 123 S.E. 879 (1924); State Board of Medical Examiners v. Lewis, 149 Ga. 716, 717, 102 S.E. 24 (1920). It follows, therefore, that since license revocation proceedings already had begun when the instant suit was filed, federal court interference with those proceedings is prohibited by the anti-injunction statute, just as interference with the state criminal proceedings is prohibited.[3]

"[4, 5] Here, as in Reetz, the plaintiff has challenged a state statute regulating activities in which the State has a vital interest. The right to practice medicine is a conditional right which is subordinate to the state's power and duty to safeguard the public health, and it is the universal rule that in the performance of such duty and in the exercise of such power, the state may regulate and control the practice of medicine and those who engage therein, subject only to the limitation that the measures adopted must be reasonable, necessary, and appropriate to accomplish the legislature's valid

objective of protecting the health and welfare of its inhabitants. *See* McNaughton v. Johnson, 242 U.S. 344, 37 S.Ct. 178, 61 L.Ed. 352 (1917); Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); 41 Am. Jur., Physicians and Surgeons, §§ 3-8. It is beyond dispute that the power of the State to regulate the practice of medicine includes the power to create an administrative board and vest in it the supervision of such regulation. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

"[7] Equally without merit are plaintiff's claims that he has been denied due process and equal protection of the laws because charges which might well result in the loss of his license to practice medicine have been placed against him and because affidavits by 'known perjurers and narcotic addicts' formed the basis for these charges. To the contrary, the record shows that plaintiff has been afforded notice and an opportunity to be heard on the charges which have been made—a hearing which he seeks to prevent—and at this point it clearly cannot be said that he has been denied due process.

"Accordingly, the complaint is dismissed for failure to state a claim upon which relief can be granted."

[Footnotes omitted.]

This Honorable Court affirmed the dismissal of the *Geiger* case as follows:

"No. 5952. HUGH S. GEIGER, Jr., Appellant, v B. H. JENKINS, President of State Board of Medical Examiners of Georgia, et al.

"401 US 985, 28 L Ed 2d 525, 91 S Ct. 1236.

"March 29, 1971. Appeal from the United States District Court for the Northern District of Georgia. The judgment is affirmed. Younger v Harris, 401 US 37,

27 L Ed 2d 669, 91 S Ct. 746; and Samuels v. Mackell and Fernandez v Mackell, 401 US 66, 27 L Ed 2d 688, 91 S Ct 764.

"Same case below, 316 F Supp 370."

In the case of *State* v. *Keel*, Ala., 35 So.2d 625, shown in our Jurisdictional Statement, page 22, it clearly appears that Alabama has declared that charges such as pending before the Alabama State Board are criminal offenses just as did the Georgia courts hold that charges pending before the State Board under the statute which regulates revocation of licenses to practice medicine to be penal statutes and the revocation proceedings themselves are in the nature of criminal proceedings. *Geiger, supra.*

We now are confronted with the situation where the Georgia three-judge court dismissed the case filed in *Geiger, supra*, under quite similar revocation procedures to that in Alabama, because charges were filed before the federal injunction suit; and in *Geiger* the trial court, and later this Honorable Court, by affirming the *Geiger* case, held that such charges and revocation proceedings before the Board were penal in nature and the anti-injunction statute, *supra*, prohibited interference with such proceedings. But in the Alabama case the three-judge trial court held exactly the opposite, even though the Alabama courts held such proceedings criminal in nature, and not only granted an injunction but passed on the merits of the case as well. All this in the face of the Motion to Dismiss by the State Board and other defenses raised by the pleadings.

Now this Alabama *Gibson* case is before this Honorable Court for decision. It is also of significance to note that

this Honorable Court has denied certiorari in the appeal of the *Henry* case, *supra*, in which the 5th Circuit Court reversed the lower trial court and directed a dismissal of the case and return to the state court for further proceedings.

It is urged that the trial court appears to have based its opinion on its conclusion that charges preferred against a licensed professional in Alabama to be heard by the licensing board are administrative in nature and the anti-injunction statute (28 U.S.C.A. 2283) does not apply and its opinion rendered herein clearly so indicates this erroneous conclusion.

CONCLUSION

It is submitted that the decision of the three-judge district court is not supported by law and the facts in this case as shown by decisions of this Court, other federal courts and state courts. The State Board urges this Honorable Court to reverse the order of the trial court granting an injunction herein and direct a dismissal of this case so the issues involved can be tried in an orderly manner under the laws of Alabama.

Respectfully submitted,

J. G. L. MARSTON, III
DONALD GEORGE VALESKA, II

BY_____
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Attorneys for Appellants

Date: May _____, 1972

CERTIFICATE OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1972, I served three copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States, on all parties required to be served, by depositing copies of such Jurisdictional Statement in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
   P. O. Box 116
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 653

THOMAS S. GIBSON, ET AL.,

APPELLANTS,

v.

L. M. BERRYHILL, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

REPLY TO APPELLANT'S SUPPLEMENT TO JURISDICTIONAL STATEMENT

This brief is submitted in reply to Appellant's Supplement to the Jurisdictional Statement. Several distinctions are to be made in the cases cited by appellants and the case at bar. Each of the cases cited by appellant illustrated that there was no federal equity jurisdiction or that the movant would not be denied due process.

In *Henry v. Claiborn Hardware Company*, 444 Fed. 1300, certiorari denied March 27, 1972, ... U. S. ....., 31 L. Ed. 2d 483, The Circuit Court of Appeals' decision turned on the finding that there was no "state action" to create federal jurisdic-

tion under Civil Rights Statutes as sought by plaintiffs. In the instant case, appellees plaintiffs below, invoked federal equity jurisdiction to prevent irreparable injury.

In *Geiger v. Jenkins, President of State Board of Medical Examiners*, 316 F. Supp. 370, the district court expressly found that "at this point it clearly cannot be said that he (plaintiff) has been denied due process". The Court pointed out that the plaintiff had been afforded a right to hearing before the Board of Medical Examiners with the right to call witnesses and question them. There was no presumption or indication that he would not be given a fair trial and be afforded due process. It is to be noted by way of distinction that in the *Geiger* case, the Board of Medical Examiners had not been asked to recuse itself and its competency to hear the charges was not challenged. The court was therefore justified in presuming that plaintiff's constitutional rights would be afforded him in the "defense of a single criminal prosecution". Such is not the situation in the instant case. See *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers* 398 U. S. 281.

Neither can plaintiffs rely on *Younger v. Harris*, 401 U. S. 37. A study of the *Younger* opinion reveals that it recognized the long-standing exception to Title 28, U. S. C. § 2283 which was established in *Ex parte Young* 209 U. S. 123. This exception applied by the Court below, is that a federal court should exercise its equity jurisdiction to enjoin a state court action when the moving party has no adequate remedy at law (or in this case cannot receive due process in the first instance) and will suffer irreparable injury in absence

of exercise of such jurisdiction. Certainly it would be futile to require plaintiffs to submit themselves to a trial where they would not be afforded due process before seeking the injunctive relief sought in this instance. *City Bank Farmers Trust Co. v. Schnader*, 291 U. S. 24.

Appellants argue that appellees should have proceeded in state court to obtain injunctive relief or a writ of mandamus. This Court has firmly established the rule that where federal equity jurisdiction is established, it will not be defeated by the existence of a concurrent state court remedy. *Porter v. Investors Syndicate*, 286 U. S. 461.

The foregoing principles were preserved and enunciated in the *Younger* opinion at 401 U. S. 49-50, quoting from *Dombroski v. Pfister*, 380 U. S. 479:

> "But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. *These allegations, if true, clearly show irreparable injury.*" (Emphasis supplied).

The necessity for issue of the injunction in the court below was further required by the absence of a right to supersede the State Optometry Board's ruling pending appeal. The Alabama Optometry statute, (Appendix B to Appellant's Jurisdiction Statement, P.A. 11) provides that any person whose license is revoked "may

appeal to the Circuit Court or the Court of like jurisdiction", but without right to supersedeas.

There is no right to supersedeas under Alabama procedure other than as established by statute. See *Ex parte Cudd*, 195 Ala. 80. 70 So. 721; *Huett v. Nevins*, 255 Ala. 37, 50 So. 2d 160, and *Merrill v. Travis*, 248 Ala. 42, 26 So. 2d 258.

Absent some statutory right, jurisdiction of circuit courts of Alabama is limited to the grant of a writ of common law certiorari, to supersede the judgment for occurrences *after* its rendition as opposed to mere supersedeas pending appeal. The absence of provisions for supersedeas pending appeal is a recognized ground for injunctive relief. *Porter v. Investors Syndicate*, supra.

In studying the rights of appellees to the injunction granted by the District Court several salient points should be kept in mind. The District Court found from the testimony and evidence before it, that the hearing proposed by appellants would not afford due process in the first instance. It further found that irreparable injury would result if appellees were not afforded due process in the first "trial". The facts upon which this finding was based were clear, unequivocal and undisputed. They are, in brief:

1. The State Board of Optometry, Appellants, had previously prosecuted a Civil Suit against appellees in which they alleged that appellees were guilty of the offenses for which they (appellants) sought to prosecute license revocation proceedings. Under Alabama law, such proceedings constituted a deprivation of due process and disqualified appellants to conduct the hear-

ings as a matter of law. See *Miller v. Aldridge*, 212 Ala 660, 103 So. 835.

2. Appellant board members were members of an association which had as one of its avowed purposes, the elimination of practice of optometrists employed by a corporation (which appellees were).

3. The only power the State Board had at the conclusion of such hearing was to suspend or revoke appellee's license, thereby depriving appellees of the right to practice their profession.

4. Last, but not least, the optometry statute provided no method by which appellees could retain their license pending review by a State Appellate Court.

If appellees' licenses were suspended or revoked, they stood to lose whatever practice they had, and their livelihood in the interim with whatever damage might be suffered by having had their licenses revoked for professional misconduct, assuming they were later able to procure reinstatement.

Attached to this brief as Appendix F is a copy of the decision of the Supreme Court of Alabama in the case of *Lee Optical Company of Alabama* vs. *State Board of Optometry*, So. 2d ; announced March 30, 1972, application for rehearing having been subsequently denied. This is the appellate review of the lower court decision shown as Appellants Appendix F., page A22 of the Jurisdictional Statement which was the civil suit originally brought by appellants against appellees in the state courts of Alabama.

Thus, the charges which appellants sought to prosecute in their administration board hearings have been declared inoffensive by the highest State Court of Alabama.

CONCLUSION

This case embodies the historical principles requiring the exercise of federal equity jurisdiction to enjoin, or prevent a prosecution, be it administrative or judicial, criminal or civil, where as a matter of law the plaintiff-appellees could not receive due process in a state court proceeding and would suffer irreparable harm if jurisdiction were refused.

The undisputed facts giving rise to federal jurisdiction coupled with the lack of any substantial federal question, particularly considering the *Lee Optical Company of Alabama* v. *State Board of Optometry*, decision, supra, Appendix F, dictate that the action of the District Court be affirmed.

Respectfully submitted,

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APPENDIX F

CITE AS 6 ABR

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OPTOMETRY—TITLE 46, SECTIONS 210 AND 211

There is no provision in the State statute governing the regulation of the optometric practice which precludes an optical company from employing a licensed Optometrist or permitting one to practice on its premises.

The Supreme Court of Alabama in this opinion has ruled in light of our statutory provisions and the policy to be deduced therefrom that the practice of optometry is not to be considered as the practice of a learned profession. Our statutes on optometry merely regulate the practice of optometry. Under these conditions, and in the absence of special statutory provisions necessitating a different conclusion, the courts have refused to construe such statutes as prohibiting the employment of persons licensed to practice optometry.

R. T. H.

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1971-72

Lee Optical Company of Alabama, Inc., A Corp. 3 Div. 488

v.

State Board of Optometry

Appeal from Montgomery Circuit Court, In Equity

HARWOOD, JUSTICE

The Alabama Board of Optometry (hereinafter referred to as the Board) filed a bill against Lee Optical Company of Alabama (hereinafter referred to as Lee). Originally thirteen optometrists and one physician were also named as co-respondents along with Lee, but these individual respondents were eliminated on order of the court.

The bill sought to enjoin Lee "from the unlawful practice of optometry, either directly or indirectly in the State of Alabama," and from employing by any means or arrangement registered (i.e., licensed) optometrists or physicians, surgeons, or oculists to examine the eyes of Lee's customers and prescribe eyeglasses for Lee's stores in Alabama.

At this point it would not be amiss to point out that our statutes pertaining to optometry, originally passed in 1919, are to be found in Chapter 11, Title 46, Code of Alabama 1940, Sections 190-213 inclusive, and hereinafter all references to code sections will be

deemed to be those in Chapter 11, Title 46. The original provision of the optometry law remained without material change until 1965.

Prior to its repeal in 1965, Section 210 read as follows:

"Nothing in this chapter shall be so construed as to prevent any person, firm, or corporation from owning or operating a store or business establishment wherein eyes are examined or glassed fitted; provided, that such store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm, or corporation." Until amended in 1965, Section 211 provided:

"It shall be unlawful for any person, firm or corporation, engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or published, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. And it shall be unlawful for any individual, firm or corporation, engaged in the sale of goods, wares or merchandise who maintains or operates, or who allows to be maintained and operated in connection with said mercantile business an optometry department; or who rents or subleases to any person or persons for the purpose of engaging in the practice of optometry therein, any portion of or space in said store, premises or establishment in which such person, firm or corporation

is engaged in said mercantile business, to publish, or circulate, or print or cause to be printed, by any means whatsoever, any advertisement or notice of the optometry department maintained, operated, or conducted in said establishment or place of business, in which said advertisement or notice appear any untruthful, improbable, impossible, or misleading statement or statements, or anything calculated to mislead or deceive the public."

By Act No. 218, approved 4 August 1965, 1965 Acts of Alabama, p. 304, Section 210 was repealed in its entirety, and Section 211 was amended to read:

"It shall be unlawful for any person engaged in the practice of optometry in this state to print or cause to be printed or circulate or cause to be circulated, or published, by any means whatever, any advertisement or circular in which appears any untruthful, impossible, improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public."

The crucial question presented in the court below was whether Lee, in view of the statutory changes above mentioned was directly or indirectly practicing optometry by having in its optical stores registered optometrists whether as an employee of the store, or as an occupier of space in the store.

The undisputed evidence shows that for some time prior to the statutory changes above mentioned, Lee employed a registered optometrist in its optical stores. He was employed on a salary basis for the purpose of examining the eyes of prospective customers who came into the store to buy eyeglasses, but who did not have a prescription. No charge was made for the eye examina-

tion except in those cases where the examination indicated the customer did not need glasses. In this event a charge of $5.00 was made for the examination, such payments going to Lee. The optometrist under such employment received certain fringe benefits such as participation in a pension and profit sharing plan, hospital and life insurance programs, etc.

The contract could be terminated at any time by either party.

After the repeal of Section 210, and the amending of Section 211, the Secretary of the Board wrote to every registered optometrist, including those employed by Lee, calling attention to the changes in the optometry statute.

It appears, however, that Lee continued its original method of employment of optometrists in its stores until 1 April 1970, some four or five years after the filing of the complaint in the present suit.

On 1 April 1970, Lee notified all the optometrists employed by it that the original contract of employment was being cancelled.

In lieu of the original contract a new contract was entered into between Lee and the formerly employed optometrists.

Under this new agreement Lee agreed to furnish to the optometrist sufficient space in its store, together with adequate ophthalmic equipment necessary for the optometrist to carry on his practice. The optometrist agreed to conduct his practice in a skilled manner in accordance with all applicable laws, and maintain a proper doctor-patient relationship with his patients.

The optometrist agreed to maintain all necessary patient records, and to separately charge his patients for eye examinations. Lee agreed to collect such examination fees, to keep records in connection therewith, and to remit such fees to the optometrist semi-monthly.

The optometrist agreed to maintain during the term of the agreement sufficient malpractice and liability insurance to protect Lee from any liability resulting from the optometrist's practice on Lee's premises, and to hold Lee harmless from any such claim.

It was stipulated in the agreement that it was in no way to be construed as an employment contract, and that neither party should have any right of control over the respective operations of the other.

It was further provided that the agreement could be terminated by either party upon ten days' notice in writing to the other.

Optometrist witnesses presented by Lee who had worked for Lee under the first arrangement and who continued their practice in Lee's stores after the second agreement, testified that the only material changes in the work of the optometrists before and after the change in the agreement between Lee and the optometrists was that after the change the optometrists received no salary or fringe benefits from Lee, and they themselves fixed and received the fees for eye examinations performed by them. Further, after the change in the agreement no time was fixed for their presence in the stores.

In the hearing below, the Board presented a number of witnesses who, at the request of members of the Board, or at the request of members of the Alabama

Optometric Association, had gone into Lee stores for the purpose of eye examinations and to purchase glasses.

Two of these witnesses were students in an optometry school in Memphis, and the others were either relatives or employees or acquaintances of optometrists practicing individually.

Their testimony concerned chiefly the time taken in making the examinations. This time was stated to be from three minutes to ten minutes.

For instance, Miss Linda Daves testified that at the request of her friend Linda Stauter, a former employee of an optometrist practicing individually in Mobile, she had on 27 August 1970, gone to two Lee stores in the Mobile area for the purpose of buying glasses. The optometrist had given her $30.00 with which to purchase the glasses.

In one Lee Store she had her eyes examined by Dr. Pillion. First, the receptionist filled out a form showing her name, age, address, etc., and the nature of her complaint, which she stated to be headaches. She then saw Dr. Pillion. According to Miss Daves his examination lasted three minutes. She then proceeded to select frames for the prescribed glasses. She had been instructed to note the time of the examination and the length of time she was in the store. This she did with her watch. She was in the store altogether eight minutes, which included the time used by Dr. Pillion in examining her eyes, the selection by her of the frames, etc. She paid $20.80 to Lee. After the visit to the first Lee store she went back to the individual optometrist's office and returned the $9.20. She was then given another

$30.00 for the visit to the second Lee store. Again the charge was $20.80, and again she returned the balance of the $30.00 after the payment to Lee of $20.80.

In rebuttal Pillion testified that he did not have an independent recollection of his examination of Miss Daves, but he had a record of his examination made of her eyes on 27 August 1970. He always inquired of a patient as to his or her medical history, and the type of trouble the patient was having with his or her eyes. Miss Daves had indicated she was having headaches. From the data on his record showing the type of examination he had made of Miss Daves' eyes, it would have been impossible for him to have made such examination in three minutes.

Dr. Pillion further testified that the time necessary for an eye examination depends upon the cooperation of the patient and his ability to respond to questions during the examination, and the conditions disclosed. An examination of a patient with minimum difficulty would require from ten to twenty minutes.

If a patient requested a copy of a prescription for glasses he would be given the prescription and the patient would be free to buy glasses from any optician. Ordinarily, however, a patient did not request a copy of a prescription, and after writing the prescription, he would hand it to the receptionist in the Lee store who would then attend to the selection of the frames by the patient and the processing of the procurement of the completed eyeglasses.

A number of optometrists who practiced individually, several of whom were members of the Board, testified without exception that they sold eyeglasses to

patients after examining their eyes and determining the prescription for eyeglasses. Unless a patient asked for a copy of the prescription it was not given. If glasses were sold a patient, their fees ranged from $30.00 up for single vision glasses. This included the fee for the eye examination. If glasses were not purchased, their fee for the examination ranged from $12.00 to $30.00 depending upon the nature of the examination.

After completion of the hearing below the Chancellor entered a decree in which he made extensive findings. He decreed that Lee be enjoined from:

1. Engaging in the practice of the profession of optometry, either directly or indirectly, and from employing, by any means, directly or indirectly, licensed optometrists or physicians to examine the eyes of its customers.

2. Keeping optometrists, whether by contract of employment, or by lease agreement or device, in its places of business in Alabama.

3. Showing on its store front or in its advertisements the name of any optometrist or physician, or from using in such displays any such phrases as "eyes examined", "your scientific eye examination", "glasses fitted", or from using any such phrases that would indicate to the public that Lee is qualified to examine the eyes of its customers or to fit eyeglasses for them in connection with the sale of eyeglasses.

4. From making any arrangement with any optometrist or physician whereby it would refer its customers to such optometrist or physician, or whereby such optometrist or physician would refer their patients to Lee, for the specific purpose of pro-

noting the sale of Lee's eyeglasses, regardless of where such optometrist or physician is located.

5. From making any referrals of customers to any specific eye specialist, or indicating the possible convenience of a nearby eye specialist.

As before stated, our statutory law relating to optometrists and the practice of optometry is to be found in Title 46, Chapter III, Sections 190-213 of our code, as amended.

As to the purpose of the legislature in repealing Section 210, and amending Section 211, we can only determine what such purpose was by what the legislature did or said. *Holt v. Long*, 234 Ala. 369, 174 So. 759; *Ex parte Wilson*, 269 Ala. 263,112 So. 2d 443. Further, while a literal construction of a statute is not to be permitted to defeat the spirit of a legislative act, nevertheless where an act pertains to a whole subject the act in all its parts must be considered, and not merely an isolated section. *Ex parte Wilson*, supra.

Prior to the decretal portion of his decree the Chancellor set forth:

"The court holds that the action of the Alabama Legislature in repealing Section 210 and amending Section 211, terminated the right that Lee had to conduct an optical dispensing business with the aid and assistance of an optometrist employee. There is no longer in Alabama statutory authority for a person, firm or corporation to operate a business wherein eyes are examined and glasses fitted even with a licensed optometrist on the premises, and the court holds it is unlawful for Lee to do so or to advertise to the effect that it is qualified to do so."

Alabama State Board of Optometry v. Busch Jewelry Co., 261 Ala. 479, 75 So. 2d 121, pertained to the revocation of the license of an optometrist for advertising, contrary to the canons of the Alabama Optometric Association. As to the legislative policy embraced in Section 210 prior to its repeal, this court declared such policy to be to permit, first, "the operation of an optometric department as part of a general merchandising business, provided such department is in charge of a duly licensed optometrist," and second, "the advertising of such department, provided the name of the licensed optometrist is used in the advertising." Therefore, the naming of the optometrist in advertising by a corporation was compulsory under the then existing Section 210, which this court held superseded any rule or canon of the Alabama Optometric Association prohibiting advertising by an optometrist.

Whether the repeal of Section 210 would now place optometrists within the advertising ban of the Alabama Optometric Association as amended which as set forth in *Busch Jewelery Company*, supra, prohibits advertising by optometrists except for new licensees or members who change their location when a discreet professional card may be run for a reasonable time not to exceed ninety days, is not before us. This for the reason that this proceeding is not for the purpose of revoking the license of an optometrist.

We cannot see that the mere repeal of Section 210, and the amending of Section 211, "terminated the right that Lee had to conduct an optical dispensary business with the aid and assistance of an optometrist employee" as ruled by the Chancellor.

This, we think must depend upon legislative policy

reflected by all our statutes pertaining to optometry, and also whether optometry is to be classified as a learned profession.

In *Sales-Davis Co. v. Henderson-Boyd Lbr. Co.*, 193 Ala. 166, 69 So. 527, it was stated:

> "The courts have gradually enlarged the implied powers of ordinary corporations, until such corporations may do almost anything that an individual may do, provided the state and the stockholders and creditors do not object."

Clearly, there was no objection from the stockholders or creditors in this case to Lee permitting optometrists to practice in its stores. Nor can we find any objection evidenced in our optometry statute.

The occupation of optometry was one of common right, and was unregulated by the state until 1919.

Where statutes regulating callings of common right are passed under the police power of a state, the right to such calling remains except as limited by the provisions of the regulating statute. *State v. Gus Blass Co.*, 193 Ark. 1159, 105 S. W. 2d 853.

It would appear therefore that the only effect of the repeal of Section 210 (and the amendment of Section 211) is to take away the statutory authority of a corporation or firm to advertise the name of any optometrist employed by such person, firm or corporation.

In this connection we note that Section 206, Title 46, Code of Alabama 1940, relating to the revocation or suspension of the license of an optometrist, lists as one of the grounds of revocation, "* * * or the doing or performing of any acts in his profession declared by

the Alabama Optometric Association to be unethical or contrary to good practice."

The decisions relating to whether employing a licensed optometrist constitutes practicing optometry by the unlicensed employer, usually an optical dispenser, are legion, and most often of considerable length. Authority may be found for most any view. We would further compound our reluctant affront to desired brevity should we attempt to quote from, analyze, and cite all such cases in this necessarily overlong opinion. The discordance to be found in the varied conclusions reached springs from the variety of the controlling statutes. Many of these decisions are collected and commented upon in an annotation to be found in *88 ALR 2d 1293*, Section 3.

Many states have statutes to the effect that it is unlawful for any licensed optometrist to practice his profession in any mercantile establishment; or to engage in the practice of optometry with any organization, group, or lay individual; or to accept employment from any company or corporation; or to practice optometry on premises not separate from premises where eyeglasses are sold. See *Gen. Stats. of Connecticut*, Chap. 380, Section 20-133(a); *Florida Stats.*, Title 30, Section 463.11; *Maine Rev. Statutes*, Title 32, Section 2452; *Annotated Laws of Massachusetts*, Chapter 112, Section 73B; *Rev. Code of Montana* (1947), Title 66, Section 66-1312; *New Hampshire Rev. Statutes*, Chapter 327, Section 27; *Oklahoma Statutes*, Title 59 Section 585(c); *South Carolina Code of Laws*, Title 56, Section 1077(5); *Tenn. Code, Anno.*, Title 63, Section 815; *West Virginia Code*, (1966), Chap. 30, Art. 8, Section 10.

On the other hand some states have by statute apparently expressly authorized licensed optometrists to practice as employees of unlicensed persons, firms, or corporations. See *Colo. Rev. Stats.*, Section 102-1(a); *Illinois Rev. Stats.*, Chapter 90, Section 105.4; *Virginia Code*, Title 54, Section 388(J).

The Alabama Legislature has no statute expressing a policy either way on this question. However, a policy can be deduced from the provisions of Section 204 setting forth that one of the grounds for revocation of an optometric license is, "* * * employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work."

While such provision could apply only to a licensed optometrist employing an unlicensed optometrist, yet the implication is that an optometrist may accept employment from others.

The deposition of Thomas S. Gibson was received in evidence at the behest of the respondent. Dr. Gibson has practiced optometry in Huntsville, Alabama, for thirty years, and was a former President of the Board, and Vice President of the Board at the time of the hearing below, as well as a former President and Vice President of the Alabama Optometric Association. Dr. Gibson testified that so far as he knew there is no rule promulgated by either the Board, or the Alabama Optometric Association which would prohibit an optometrist from practicing on premises either furnished to him, or leased to him, by a dispensing optician, nor as far as he knew is there anything which prohibits a dispensing optician from referring patients to a practicing optometrist. Neither was there anything wrong

in an optometrist referring patients to a dispensing optician.

This court has held that the practice of optometry bears a substantial relation to public health, and that it calls for special skill and knowledge of those practicing it, and for this reason the legislature undertook to regulate optometry in order that incompetents and fakers could not impose upon the public. *Hampton v. Brackin's Jewelry Co.*, 237 Ala. 212, 186 So. 173.

Our legislature has spoken, and has prescribed limitations upon those who may practice optometry. Nowhere in our statutes are there any restrictions on licensed optometrists as to how, when, or for whom they may work. There is nothing forbidding his acceptance of employment at a salary, nor forbidding anyone from employing him, and nothing stating that such employment is unlawful, or against public policy.

The purpose of our optometry act is to license and regulate those who examine eyes and prescribe eyeglasses. When that purpose is accomplished by a specific statutory provision, it is not within the province of the court to read into it something not designed to protect the public interest. Our statutes were designed to protect the public, and not to confer favors upon optometrists, or any special group of optometrists. Certainly, there is a social interest involved in this situation in affording the public an opportunity of procuring prescription eyeglasses at the least cost, provided incompetents are not permitted to examine eyes. Our licensing provisions were designed to see that only persons qualified to do so would perform this service.

In *Golding v. Schubach Optical Co.*, (Utah), 70 P. 2d 871, a case involving the same question as the one

now being considered, and under almost identical statutory provisions, the Supreme Court of Utah wrote:

> "The right of one to sell his time and talents is the same, and as inalienable as the right of the owner of any other property to contract concerning the use, sale, or enjoyment thereof. This right of contract, of course is subject to such reasonable police regulations as may be enacted to promote the public goods."

Section 35 of our Constitution of 1901, declares:

> "The sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression."

We find nothing in our statutes pertaining to optometry evidencing a legislative policy that an optometrist duly qualified and licensed under the laws of this state, may not be employed by another to examine eyes for the purpose of prescribing eyeglasses.

We are therefore not in accord with the Chancellor's ruling that the repeal of Section 210 and the amendment of Section 211 "terminated the right that Lee had to conduct an optical dispensary business with the aid and assistance of an optometrist employee."

To obtain a license to practice optometry in this state one must have completed certain specified educational requirements, including a course of study in an approved school or college of optometry which requires at least three years of study, and then must pass the standard examination prescribed by the Board.

With this imprimatur of competency one is then granted a license to practice optometry.

We come now to consider whether the decree of the lower court should be upheld on the theory that the practice of optometry is the practice of a learned profession whose members are not permitted to hire themselves out to any third party who seeks to employ them and their talents for purposes of profiting from the resale of their services.

We gather from certain expressions in the Chancellor's decree that he considered optometry a learned profession. In addition to setting out in his decree a portion of the opinion of the Supreme Court of Mississippi in *Sears Roebuck & Co. v. State Board of Optometry*, 213 Miss. 710, 57 So. 2d 726, wherein it was stated: "The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine * * *", the Chancellor further set forth that the repeal of Section 210 "was a recognition by the Alabama Legislature * * * that it was not in the best interest of Alabama citizens to maintain the statutory distinction between the practice of optometry and the other professions in the health field", and further that "an optometrist, like a dentist or a physician has a relationship with his patients that cannot be nurtured in the market place."

There are several callings in the health care field, or the healing arts field, which cannot be classified as learned professions such as medical technicians, registered nurses, practical nurses, pharmacists, chiropodists, and perhaps others.

As to optometrists, Section 207 provides:

"Nothing in this chapter shall be construed as

authorizing any optometrist to administer drugs in any form, to practice or claim to practice, medicine, or surgery in any sense, or to use any title or appellation intended or calculated to indicate the practice of medicine or surgery."

These specific provisions expressing in clear terms the legislative policy necessitates the conclusion that a court would not be justified in concluding that optometry is "a subdivision of the practice of medicine" or that repeal of Section 210 was "a recognition by the Alabama Legislature that it was not in the best interest of the citizens of Alabama to maintain the statutory distinction between the practice of optometry and the other professions in the health care field." The practice of medicine is of course in the health care field. By leaving Section 207 untouched, the legislature specifically retained the distinction between the practice of optometry and the practice of medicine. We would not be warranted in ignoring this clearly expressed legislative policy.

Nor do we consider that the relationship existing between an optometrist and patient rises to the degree of confidential relationship existing between doctor and patient or attorney and client. A person seeking the services of a physician or lawyer must reveal to such professional adviser the most intimate secrets of physical or mental disability, or of his business or conduct. As stated in *Silver v. Lansburgh & Bro.*, 111 F. 2d 518, such relationship by its very nature creates a relationship of trust and confidence, and the physician's or attorney's allegiance must be wholeheartedly to the patient or client, and not to another, and "nothing of this nature applies to the practice of optometry."

Ordinarily information of no great intimacy is revealed by one seeking only an eye examination looking toward securing proper lenses for eyeglasses.

Section 190 defines optometry as follows:

"The practice of optometry is defined to be the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its functional powers and adopting mechanical means for the aid thereof."

In *Silver v. Lansburgh*, supra, the following is set forth:

"We have considered the cases, and are of opinion the best considered adopt the view that optometry is not 'one of the learned professions.'

"Optometry is said by a well known writer on the subject not to be a part of medicine, 'either by inheritance, basic principles, development or practice.' It is 'an applied arm of optical science resting upon the work and discoveries of physicists and opticians through the ages down to modern times. It does not treat the eye, whether in health or disease, but adapts the light waves which enter the eye, in accordance with optical principles so as to produce focused and single vision with the least abnormal exertion on the part of the eye.' Arrington's History of Optometry, p. 24 (1929)."

In *Hampton v. Brackin's Jewelry and Optical Co.*, supra, this court elaborated on the definition of optometry. We find nothing therein departing from the basic definition of optometry as set forth in Section 207. After pointing out that the duties of an optome-

trist do not require, or even authorize, diagnosis and treatment of eye diseases, the court further observed that if in the performance of his duties it should be apparent to a skillful optometrist that a disease or malformation of the eye existed, "we would not say it would not be his duty to so advise his patient, so that proper medical or surgical treatment might be had."

Many callings or vocations which, because they require special knowledge of a branch of science, or special skills and abilities, are designated as professions.

Such designation does not, however, constitute these callings into a learned profession. They are professional only in the broader meaning of the term. The legislature as well as this court has recognized optometry as a profession. See *Hampton v. Brackin's Jewelry Co.*, supra. This does not mean, however, that by such recognition of optometry as a profession, it follows that optometry is thereby made a learned profession. Indeed, in *State v. Bubl Optical Co.*, 131 Ohio St. 217, 2 N. E. 2d 601, the Supreme Court of Ohio, commenting upon a former Ohio case wherein it was held that optometry was a profession, stated it was not meant thereby to hold that optometry was a learned profession, but that it was a "limited statutory profession."

Through time the learned professions have been recognized as law, medicine, and the ministry, to which is sometimes added the profession of arms. This recognition has resulted from the inherent nature of the callings, and prior to, and not from any statutory enactments regulating their conduct. See *Golding v. Schubach Optical Co.*, supra; *Georgia State Board etc. v. Friedman's Jewelers*, 189 S. E. 238; *State v. Kindy Optical Co.*, 216 Iowa 1157, 248 N. W. 332; *Dvorine*

v. Castleberg Jewelry Corp., 170 Md. 661, 185 A. 562; *Mack v. Saars*, (Conn.), 188 A. 2d 863.

Our research discloses that four states have by statute specifically declared optometry to be a learned profession, namely Arkansas, Colorado, Georgia, and Nevada. See *Arkansas Stats. Anno.* Chapter 8, Section 72-801; *Colorado Rev. Stats.* Chapter 102, Section 102-1-1; *Georgia Code Anno.*, Title 84, Section 1101; *Nevada Rev. Stats.*, Title 54, Section 636.010.

Interestingly, after the Supreme Courts of Arkansas and Georgia had held that under their then statutes, highly similar to our present statutes, that optometry was not a learned profession, the legislatures of those two states amended their optometry statutes to specifically declare that optometry was a learned profession. The courts gave accord to this declared legislative policy, the Arkansas court stating that though the legislative policy might be questioned, it was the constitutional right of the legislature to declare optometry to be a learned profession. *Melton v. Carter*, (Ark.), 164 S. W. 2d 453. See also *Lee Optical of Georgia v. Georgia Board etc.*, 138 S. E. 2d 165.

We hold that in light of our statutory provisions and the policy to be deduced therefrom that the practice of optometry is not to be considered as the practice of a learned profession. Our statutes on optometry merely regulate the practice of optometry. Under these conditions, and in the absence of special statutory provisions necessitating a different conclusion, the courts have refused to construe such statutes as prohibiting the employment of persons licensed to practice optometry. *Mack v. Saars*, supra, and cases cited therein.

In *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241, this court upheld the constitutionality of Section 206 which provides among other things that the license of an optometrist may be revoked for "the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice."

The court took pains, however, to make clear that the State Board of Optometry may not enforce any rule or regulation of the Alabama Optometric Association which is inconsistent with the express provisions of our optometric statutes, stating, "We will not allow anyone to be penalized for acts expressly permitted by statute," and that administrative action cannot subvert or enlarge upon expressed statutory policy, nor deviate from such policy. We must therefore look to the legislative policy to be found in our statutes regulating optometry.

We also wish to note that this proceeding does not involve any misconduct by a duly licensed optometrist. It is solely against Lee which does not, and indeed could not, obtain a license to practice optometry. The only point involved in this proceeding is whether it is unlawful for Lee to employ a licensed optometrist, or to permit one to practice on its premises.

It is our conclusion therefore that the decree here appealed from is erroneous, and must be reversed.

REVERSED AND RENDERED.

Heflin, C. J., Lawson, Merrill and Maddox, JJ., concur.

COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-653

BRIEF OF APPELLANTS

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-653

THOMAS S. GIBSON, ET AL.,
Appellants,

VERSUS

L. M. BERRYHILL, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BRIEF OF APPELLANTS

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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-653

THOMAS S. GIBSON, ET AL.,
Appellants,

VERSUS

L. M. BERRYHILL, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BRIEF OF APPELLANTS

INTRODUCTORY PARAGRAPH

Appellants appeal directly from the judgment of the United States District Court for the Middle District of Alabama (a three-judge panel convened pursuant to 28 U.S.C. § 2284), entered on September 3, 1971, denying the motion to dismiss of the appellants, restraining and enjoining appellants, Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr, and Willard Smith, individually and as members of the State Board of Optometry and their successors in office from conducting a hearing on the charges heretofore preferred against the appellees optometrists to determine what action should be taken on the evidence

produced at a hearing on said charges and submit this brief in support of our appeal. Probable jurisdiction was noted on June 26, 1972.

OPINION BELOW

The Opinion of the District Court is reported in 331 Fed.Supp. 122. A copy of the Opinion of the Court and Judgment are attached as Appendix A to the Jurisdictional Statement (Appendix p. 1, p. 17).

JURISDICTION

The appeal herein is from a final Judgment made and entered by the United States District Court for the Middle District of Alabama, Northern Division, specially constituted under 28 U.S.C. §§ 2281 and 2284 holding unconstitutional Sections 192 and 206, Title 46, 1940 Code of Alabama, two state statutes and granting appellees injunctive and other relief. The Judgment appealed from was made and entered on September 3, 1971. Notice of Appeal was filed in the United States District Court for the Middle District of Alabama, Northern Division, on September 22, 1971. The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by 28 U.S.C. § 1253 in that a final judgment was entered granting, after notice and hearing, a permanent injunction in a proceeding required to be heard and determined by a district court of three judges. The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Flash* v. *Cohen*, 392 U.S. 83 (1968); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965);

Zwicker v. *Koota*, 389 U.S. 241 (1967); *Perez* v. *Ledesma*, 91 S.Ct. 674 (1971).

The state statutes that are involved are Sections 192 and 206 of Title 46, Code of Alabama, which provide, as follows:

"Title 46

"§ 192. (2875) State board of optometry; how constituted.—The governor shall appoint a state board of optometry consisting of five persons each of whom shall be a citizen of the United States, over the age of twenty-five years, a member in good standing of the Alabama optometric association, incorporated, or its legal successor, and shall have been engaged in the actual continuous practice of optometry in the State of Alabama for at least five years next preceding his appointment. One member of said board shall be appointed each year for the term of five years and shall hold office until his successor is appointed and qualified. The governor may remove from office at any time any member of the board for neglect of duty, incompetency, improper or unprofessional conduct, or when the license or certificate of any member has been suspended or revoked. Vacancies on said board shall be filled by appointment by the governor in the manner hereinbefore provided. The governor shall furnish each member of said board at the time of his appointment a certificate of appointment, and each appointee shall qualify by taking the usual oath of office before the judge of probate of his home county within fifteen days from date of his appointment. (Ib.)"

Section 206:

"• • • Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same, and a copy of the charges,

which must be made in writing, and verified by oath, together with a notice of the time and place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be effected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of license as herein provided for, the holder may appeal to the circuit court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked resides. (Ib.)"

All of Section 206 is shown as Appendix A, pp. A1-A2.

QUESTIONS PRESENTED

1. Whether Section 192, Title 46, of the optometry law, Code of Alabama, is unconstitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

2. Whether Section 206, Title 46, of the optometry law, Code of Alabama, is unconstitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

3. Whether Board Rule No. 1 additionally protected the rights of plaintiffs if an appeal was taken from an adverse board ruling, after hearing, in view of the general right to supersede as provided by the Alabama law; also in holding that the State Board is illegally constituted.

4. Whether the court erred in enjoining the State Board of Optometry and their successors in office from hearing these pending charges against the plaintiffs because of alleged pecuniary gain, bias or prejudice, before a hearing, when mandamus is provided in the Alabama law to test these questions, with right of full hearing in court.

5. Whether the court erred in finding the plaintiffs had been harassed by defendants to their irreparable damage on the evidence before it.

6. Whether the court erred in assuming from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiffs.

7. Whether the court erred in overruling defendant's motion to dismiss this action.

STATEMENT

On August 4, 1965, the Alabama Legislature repealed Section 210, Title 46, 1940 Code of Alabama, and amended Section 211, which does not appear to be involved in this suit.

Section 210 and Section 211 before and after repeal and amendment are attached as Appendix B, p. A2, because throughout the proceedings on this matter the repeal of Section 210 of the Alabama Optometry Law is frequently referred to. Prior to the repeal of Section 210, optical dispensaries, jewelry stores and such, were permitted to maintain an optometric department wherein eyes were examined so long as it was in charge of an optometrist. After Section 210 was repealed, there was no longer any statutory authority for such stores to maintain such departments as the Alabama courts and others have held. The optometrists employed by Lee Optical Company of Alabama, Inc. (hereinafter referred to as Lee Optical) are the plaintiffs below and appellees in this appeal and for ease of reference will be referred to hereafter as plaintiffs. The State Board of Optometry, defendant below, together with the members of the State Board and other named defendants will be hereafter referred to as defendants and the State Board of Optometry will be referred to as State Board. The plaintiffs were notified by the State Board of the repeal of Section 210 of the optometry law and requested all optometrists to comply with the optometry law as amended and this included the plaintiffs herein. This notice from the State Board is attached hereto as Appendix C, p. A4.

Lee Optical and the plaintiffs made no effort to comply the optometry law as amended and continued to rtise "scientific eye examinations" and "eyes exam-" The Alabama Optometric Association, one of the ndants herein, and hereafter referred to as the Associ-, took note of this failure of the Plaintiffs to comply the amended optometry law and after conducting an tigation, gathered evidence of this fact, and then au-ized its president, Dr. Roy Adams, to file charges nst each of the plaintiffs before the State Board and was done and the charges and exhibits attached eto against Dr. Harry Sparks are the same, in general, hose filed against the other defendants. Appendix A4. This was done on October 23, 1965, over two and half months after the repeal of Section 210 of the metry law and notice to the plaintiffs of such repeal. affidavit of Dr. Roy Adams is attached hereto as Ap-lix D, p. A11.

On October 25, 1965, the State Board filed an injunc-suit against Lee Optical and the plaintiffs in the Cir-Court of Montgomery County, Alabama, in equity. The ntiffs in this suit were defendants in the injunction along with Lee Optical and all of the defendants in case filed a plea in abatement in the Circuit Court and was sustained by the court and the suit dismissed and ppeal was made to the Alabama Supreme Court in this nction suit. The parties to this injunction suit and the rneys in the injunction suit for both Lee Optical and optometrists are the same attorneys representing the ntiffs in the case on appeal here. There were other suits d by the State Board seeking injunctions against other h optical dispensaries operating as did Lee Optical a

their employed optometrists, one of which was the suit against the House of $8.50 Eyeglasses, and everyone realized that the determination of the ruling on the motion to abate in the Lee case would be decisive not only in the Lee Optical case but the other cases as well, so there was a general understanding among the attorneys for the respective parties that hearings on the charges filed with the State Board would be held in abeyance awaiting a ruling by the Supreme Court of Alabama on the appeal of the Lee Optical case by the State Board.

During the time the appeal of this Lee Optical case was pending before the Alabama Supreme Court, the Alabama Legislature passed an act giving all state licensing boards the right to bring an injunction suit against those so unlawfully practicing. Its provisions were made retroactive as well as applying to any future actions brought thereunder.

The adoption of this Section 1063(1), Title 7, Alabama Code Annotated was brought to the attention of the Alabama Supreme Court and on September 18, 1969, the Supreme Court rendered its decision, 226 So.2d 623, directing the Circuit Court to overrule the motion to abate and to proceed with the hearing of the case pending before it. As can be seen, this accounted for approximately four years, during which no effort was made to proceed with the charges against the optometrists on the charges pending against them, not only in this case but the other cases pending in other sections of Alabama.

When the Lee Optical case was reinstated, pursuant to the opinion of the Supreme Court in the Circuit Court

of Montgomery County, Alabama, *supra*, a demurrer on behalf of Lee Optical and the plaintiffs in this suit, was filed and without assigning reasons, the demurrers against the plaintiffs herein were sustained and the demurrer against Lee Optical was overruled so the case proceeded to trial against Lee Optical, resulting in a decree in favor of the State Board and against Lee Optical, a copy of which is attached hereto as Appendix E, p. A13. A copy of this decree was attached to defendants' motion to dismiss and pursuant to Stipulation No. 23 of the stipulations, the inclusion of this exhibit is permitted. An appeal to the Alabama Supreme Court was taken by Lee Optical in this case and it has now been decided on March 30, 1972, rehearing denied April 27, 1972, in 261 So.2d 17.

The case of the State Board against the House of $8.50 Eyeglasses and their employed optometrists, and the charges pending before the Board against these optometrists, were held in abeyance just as they were in the Lee case. However, in the *House of $8.50* case, the optometrists remained in the suit and it was tried, resulting in a decree which is attached hereto and marked Appendix F, p. A26, and permitted by paragraph 20 of the stipulation. Both the House of $8.50 and their employed optometrists were enjoined from the unlawful practice of optometry and this case has now been decided and reported in 261 So.2d 27 on April 6, 1972, rehearing denied April 27, 1972.

The charges pending before the State Board against the plaintiff optometrists herein were scheduled for a hearing on October 20, 1969, after the decision by the lower

court in the Lee Optical case in Montgomery County, *supra*, and was continued well ahead of the scheduled hearing date by agreement of the attorneys for the parties. The charges were next scheduled for hearing on May 26 and 27, 1971, and this suit was instituted by the plaintiffs against the defendants and from an adverse decision the defendants are now before this Honorable Court on appeal.

In order to carry this matter along as rapidly as possible, the defendants ordered a transcript of the proceedings before the three-judge tribunal which has now been filed with this Court and an index to the record is attached here as Appendix G, p. A28.

While this statement may appear unusually long, it is felt that it was essential in order for the argument which follows to be more meaningful.

The three-judge federal court was empaneled and, after final hearing on all issues except as stated in paragraph 5 of the pre-trial order wherein plaintiffs withdrew the charge that the State Board was estopped from prosecuting its suspension of license proceedings against plaintiffs because it had annually renewed their license to practice, and the plaintiffs withdrew without prejudice, their claim for damages, a hearing was held. It denied the motion to dismiss of the defendants and enjoined the named members of the State Board of Optometry of the State of Alabama and their successors in office from conducting a hearing on the charges heretofore preferred against the plaintiffs and dismissed the cross-claim of the defendants without prejudice.

SUMMARY OF QUESTIONS PRESENTED IN THE BRIEF OF APPELLANTS

1. WHETHER SECTION 192, TITLE 46, OF THE OPTOMETRY LAW CODE OF ALABAMA IS UNCONSTITUTIONAL UNDER ARTICLE IV, SECTION 2, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNIED STATES.

This is the section which provides that members of the State Board of Optometry shall be appointed by the governor from a list furnished by the Alabama Optometric Association and further that only those who are members of the Alabama Optometric Association in good standing are eligible for appointment to the State Board. The record will show that the recommendation of the Association was seldom followed and none has been made in recent years. None of the members of the State Board were recommended to the governor by the Association but they were, at the time of their appointment, and still are, members of the Association and in good standing. The trial court held this provision to be unconstitutional. In the case of *McCrory* v. *Wood*, 171 So.2d 251 (decided January 1, 1965), the Alabama Supreme Court held this section to be constitutional and according to Section 1652 of Title 28 U. S. Code, this decision is binding on the federal courts in civil actions in cases where it applies. Numerous other cases from other jurisdictions similarly holding are cited in the Brief.

2. WHETHER SECTION 206, TITLE 46, OF THE OPTOMETRY LAW CODE OF ALABAMA, IS UNCONSTITUTIONAL UNDER ARTICLE IV, SECTION 2 AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This is the section of the optometry law that provides that an appeal from a ruling of the State Board on charges, after hearing, is to the Circuit Court of the county of the residence of the optometrist charged. The trial court held this provision of the optometry law unconstitutional because it fails to provide supersedeas pending an appeal. This section also was held to be constitutional by the Alabama Supreme Court in the case of *McCrory* v. *Wood*, *supra*. We cite both Alabama cases and cases from other jurisdictions which hold that in the absence of providing supersedeas, the Alabama courts have the inherent authority to provide supersedeas where necessary to preserve the rights of the parties pending an appeal.

3. WHETHER BOARD RULE NO. 1 (Appendix I, p. A34) ADDITIONALLY PROTECTED THE RIGHTS OF PLAINTIFFS IF AN APPEAL WAS TAKEN FROM AN ADVERSE BOARD RULING AFTER HEARING IN VIEW OF THE GENERAL RIGHT TO SUPERSEDE AS PROVIDED BY THE ALABAMA LAW; ALSO IN HOLDING THAT THE STATE BOARD IS ILLEGALLY CONSTITUTED.

In order to make it clear that the State Board had no desire to take advantage of the optometrists charged in the event of some finding against them, Regulation Number 1 was adopted by the State Board of Optometry and promulgated which specifically states that no action would be

taken adverse to the optometrists, after hearing, pending appeal until a final determination on the appeal or abandonment thereof.

Again in *McCrory* v. *Wood, supra,* the rule-making authority of the State Board was upheld so long as it was within the legislative grant to the Board. We cite numerous other Alabama cases in addition, showing that the appellate courts of Alabama are firmly committed to the constitutional right of the Legislature to provide for administrative boards with authority to enact regulations and that a violation of them would be a criminal offense.

4. WHETHER THE COURT ERRED IN ENJOINING THE STATE BOARD OF OPTOMETRY AND THEIR SUCCESSORS IN OFFICE FROM HEARING THESE PENDING CHARGES AGAINST THE PLAINTIFFS BECAUSE OF ALLEGED BIAS, PREJUDICE AND PECUNIARY INTEREST OF THE BOARD MEMBERS BEFORE A HEARING WHEN MANDAMUS IS PROVIDED IN THE ALABAMA LAW TO TEST THESE QUALIFICATIONS WITH RIGHT OF A FULL HEARING IN COURT.

It is the contention of the defendant members of the State Board of Optometry that they are not biased, or prejudiced against the plaintiffs or that they would receive pecuniary gain as a result of hearing the charges against plaintiffs and they are not and should not be disqualified from hearing these charges. Stipulation No. 11, p. A40 herein states the individual board members would so testify and that they could render a fair and impartial verdict on the charges brought before them. The Alabama case of *Miller* v. *Aldridge*, 103 So. 835, holds that the proper remedy to

compel members of a state board to recuse themselves as disqualified to pass on a petition for revocation of certificate is by mandamus proceeding. This procedure was not followed in this case but instead the plaintiffs filed this suit in federal court. The Court, in this *Miller* case, also cites the "doctrine of necessity" which is recognized by other authorities and requires that they should hear and determine the cause, citing 15 R.C.L., page 541, in which is found the following:

> "It is well established that the rule of disqualification of judges must yield to the demands of necessity as, for example, in cases where if applied it would destroy the only tribunal in which relief could be had."

In the *Miller* v. *Aldridge case, supra,* the Court considered the ruling in the *Lehmann* case conclusive against injunctive relief. The Supreme Court in this case, 263 U.S. 394, 44 Sup.Ct. 128, 68 L.Ed. —, had the following to say:

> "We cannot * * * assume that the Board will be impelled to action by other than a sense of duty or render judgment, except upon convincing evidence introduced in a regular way, with opportunity of rebuttal."

There are numerous other cases cited supporting this question.

5. WHETHER THE COURT ERRED IN FINDING THE PLAINTIFFS HAD BEEN HARASSED BY DEFENDANTS TO THEIR IRREPARABLE DAMAGE ON THE EVIDENCE BEFORE IT.

Defendants urge there has been absolutely no evidence of harassment of the plaintiffs as alleged in their complaint. The three suits referred to in the complaint

were decided in 1954 and 1959 and the *McCrory* v. *Wood* case, *supra*, was decided January 21, 1965, all being prior to the filing of charges involved herein. The other alleged acts on the part of the State Board are not sufficient to disqualify the State Board from hearing the charges pending against plaintiffs. Other cases cited deal with optometry as a profession in the health care field and the commercial practice of optometry involved herein and other cited cases.

6. WHETHER THE COURT ERRED IN ASSUMING FROM THE EVIDENCE BEFORE IT THAT A HEARING BEFORE THE STATE BOARD OF OPTOMETRY WOULD BE A MERE FORMALITY LEADING TO THE REVOCATION OF THE LICENSES OF THE PLAINTIFFS.

The trial court was not justified in making this assumption from the evidence before it for the reasons set out in the argument and, in addition, in view of the *Lehmann* case, *supra*, which holds against making any such assumption.

7. WHETHER THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO DISMISS THIS ACTION.

We cite numerous cases in the argument, among which is *McCrory* v. *Wood*, *supra*, wherein the Alabama Supreme Court held Sections 192 and 206 of the optometry law to be constitutional and that a state board should not be enjoined because the proper way to challenge the qualifications of board members to sit is by mandamus as pointed out in *McCrory* v. *Wood*, *supra*, and numerous other citations from other jurisdictions

holding that the filing of an injunction suit such as this is not the proper way to raise the questions set out in the first and second causes of action of the plaintiffs' complaint and that the trial court erred in enjoining the State Board and their successors in office because in Alabama there is no other law providing for the appointment of another optometry board and the action by the trial court left no other tribunal to hear the pending charges.

For the reasons assigned above and in the questions presented, the defendants below and appellants herein urge reversal of the trial court and its granting of an injunction and further, that this suit be dismissed at the cost of plaintiffs, the appellees herein.

ARGUMENT

Question No. 1

Whether Section 192, Title 46, of the optometry law, Code of Alabama, is constitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The questions presented on this appeal go directly to the constitutionality of all licensing boards when the court held unconstitutional Section 192, Title 46, Code of Alabama, which is the section that provides that members of the State Board of Optometry must be members in good standing of the Alabama Optometric Association to be eligible for appointment by the governor as members of the State Board. This provision is contained in most of the laws creating licensing boards not only in the health-care field but in other fields of endeavor also. We urge that the

court committed error in holding this section of the optometry law to be unconstitutional and in enjoining the State Board from proceeding to hear the charges pending before it against the plaintiffs in this case. The optometry law contains no provision for the appointment of another board to hear the charges and no other law in Alabama provides for transferring the hearing to any other board in Alabama. The court erred in also enjoining the successors in office of the State Board of Optometry, which precluded the possibility of the present members of the State Board resigning and requesting the governor to appoint another Board. It is our contention that Section 192 is constitutional and has so been declared by the Alabama Supreme Court in the case of *McCrory* v. *Wood, et al.*, 171 So.2d 251 decided January 1, 1965, when this same question was raised. The Court said:

> "(2) It is the position of the appellant that § 192 must be declared unconstitutional because the requirement that appointees of the State Board of Optometry must be 'a member in good standing of the Alabama optometric association, incorporated, or its legal successor * * *.' He insists that the quoted qualification constitutes an unlawful discrimination and deprivation of privileges, immunities and property rights of all licensed optometrists in the state who are not members of the Alabama Optometric Association, Incorporated. It is obvious that any optometrist who works for a corporation and allows his name to be used in advertisements as does appellant would not qualify for membership in the Alabama Optometric Association and therefore would not have the qualifications to serve on the State Board of Optometry under the provisions of this section, even though such employ-

ments and acts are specifically authorized by the legislature by §§ 210 and 211, supra.

* * * * * *

"* * * The question seems to be whether there is a substantial and rational relation between the organization entrusted with the power of nomination or appointment and the function of government which the persons appointed are to perform. If so, then the statutes are generally held to be valid. A general statement on this subject appears at 12 Am.Jur. 231, § 534:

> 'Constitutional attacks have been occasionally made on statutes providing for the establishment of official boards and commissions appointed by private associations and organizations. The argument has been made that such laws amount to the granting of special privileges and to a denial of the equal protection of the laws. The trend of judicial authority is to sustain such legislation.'

For example, the courts have sustained statutes establishing boards of medical examiners to be composed of members appointed by the several medical associations within the state and even permitting one society to name more members than others were permitted to name, and also a statute providing for a municipal plans commission, the members of which were to be appointed by various enumerated organizations."

Further, at 16A C.J.S., *Constitutional Laws*, § 460, p. 179:

"Statutes have been sustained which have given the right to association or societies of persons belonging to a particular profession to appoint the members of the state board of examiners for the profession, and the same is true of a statute providing that members of the bar shall nominate persons from whom the court shall select jury commissioners, * * *."

There is an extensive annotation in 97 A.L.R.2d 373 on the power of appointment or nomination. The case of *Marks* v. *Frantz* (1956), 298 P.2d 316, found on page 373, involves the constitutionality of the appointment of an optometry board by the governor from a list of names supplied to him by the Kansas Optometric Association. The Court in upholding the constitutionality of the act stated that where the constitution of the state did not provide a method of appointment, then the Legislature was free to exercise its power in providing for appointments to state boards and the Court stated it was relying on what it deemed the "clear weight of authority" in other jurisdictions, where the courts upheld the constitutionality of such statutes and noted that many examples of restrictive powers of appointment were to be found under various state statutes indicating a settled legislative pattern.

For a partial listing of cases supporting the conclusion of constitutionality of such provisions as contained in Section 192 of the Alabama optometry law, we show a few as follows:

McCurdy v. *Jessop* (1915), 126 Md. 318, 95 Atl. 37, and *Lanza* v. *Wagner* (1962), 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670, 97 A.L.R.2d 344, *app. dismissed* 371 U.S. 74, 9 L.Ed.2d 163, 83 S.Ct. 177, *cert. den.* 371 U.S. 901, 9 L.Ed.2d 164, 83 S.Ct. 205 (both *supra*, § 3(b) in 97 A.L.R.2d 382).

In addition to the above cited cases, we find that Section 1652 of the Federal Rules of Civil Procedure provides as follows:

"The laws of the several states, except where the constitution or treaties of the United States or acts of

Congress otherwise require or provide, shall be regarded as rules of decision in simple actions in the courts of the United States, in cases where they apply."

Question No. 2

Whether Section 206, Title 46, of the optometry law, Code of Alabama, is constitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

We believe the court erred in holding Section 206 of the Alabama optometry law unconstitutional for the principal reason that even though an appeal is provided from a ruling of the State Board on charges, after hearing, to the Circuit Court of the county of residence of the optometrists charged (Appendix A, p. A1) it fails to provide supersedeas pending appeal and the court held this invades the very core of the due process of law and consequently held Section 206 to be unconstitutional.

The trial court, in its opinion, pointed out that supersedeas is within the power of the state court without such specific statutory authority therefor and cites authority to support this and further that an appeal from a judgment when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends the judgment without such bond and cites Alabama cases to support both contentions. (See the Opinion, pages A2-A9 of Appendix A in Jurisdictional Statement.) In addition, the case of *Riley* v. *Wilkinson*, 25 So.2d 384, 389 (Ala.), holds that if no supersedeas is provided it is within the inherent authority of the courts of Alabama to provide supersedeas where necessary

to preserve the rights of the parties pending appeal, including the right of the Alabama Supreme Court to do so.

The record in this case clearly reflects that there has been no desire or effort on the part of the State Board of Optometry to take any undue advantage of anyone in the handling of these charges and hearings thereon. They were continued for a number of years by general agreement in order to make a test case involving the corporate employers rather than make a test case out of the charges before the Board by scheduling a hearing on these charges in years past. Upon the filing of this suit, the attorney for plaintiffs was advised that there was no necessity of issuing a temporary restraining order because the Board would voluntarily continue the hearings on the charges before it, involving the plaintiffs herein, and this is reflected in the opinion of the court which mentions that the State Board has voluntarily withheld action on these charges.

The constitutionality of Section 206 of the Alabama law was raised in the case of *McCrory* v. *Wood, supra,* and its constitutionality was upheld except for one provision that was found to be contrary to Section 210 prior to the time it was repealed. (This provision stated the Board could not later adopt the *Rules of Ethics* of the Alabama Optometric Association as its own.)

Question No. 3

Whether the Board Rule No. 1 additionally protected the rights of plaintiffs if an appeal was taken from an adverse Board ruling after hearing, in view of the general right to supersede as provided by the Alabama law; also whether the court erred in holding that the State Board is illegally constituted.

In order to make it plain that the State Board had no desire to take advantage of the optometrists charged in the event of some finding against them Regulation 1 was adopted and promulgated which specifically states that no action would be taken adverse to the optometrists, after a hearing, pending an appeal until a final determination on the appeal or abandonment thereof. This regulation is attached as Appendix I, p. A34.

Again, in *McCrory* v. *Wood*, *supra*, the rule-making authority of the State Board was upheld so long as the regulation was within the grant to the Board from the Legislature. Other cases upholding the rule-making authority of the state boards are:

In the case of *State* v. *Keel*, 35 So.2d 625, we find that rule-making authority is well settled in Alabama when within the frame work of legislative enactment and quote from this case as follows:

> "The appellate courts of this State are firmly committed to the constitutional right of the Legislature to provide for the creation of administrative boards and commissions with authority to enact regulations and change them from time to time, and that a violation of them will be a criminal offense. Ferguson v. Starkey, 192 Ala. 471, 68 So. 348; McElderry v. Abercrombie,

213 Ala. 289, 104 So. 671; Alabama Public Service Commission v. Mobile Gas Co., 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; State v. McCarty, 5 Ala. 212, 59 So. 543; Ferguson v. Commissioners' Court of Jackson County, 187 Ala. 645, 65 So. 1028; Bond v. State Board of Medical Examiners, 209 Ala. 9, 95 So. 295; Parke v. Bradley, 204 Ala. 455, 86 So. 28; Hill v. Cameron, 194 Ala. 376, 69 So. 636; Horn v. State, 17 Ala. App. 419, 84 So. 883; Reims v. State, 17 Ala. App. 128, 82 So. 576."

According to the record, Dr. Thomas Gibson, member of the Board, verified the bill of complaint against Lee Optical and the plaintiff optometrists (also defendants therein) at the time of filing of the suit in 1965. In order to avoid any possible controversy on this question, the Regulation 1 went on to announce that if Dr. Gibson was challenged for cause, he would be excused from participating in the hearing. It, therefore, appears there could be nothing fairer done by the State Board in protecting or preserving the rights of the persons charged involved in this case.

The finding of the court that the statutes under which plaintiffs are being prosecuted, as they pertain to the plaintiffs' right to appeal from any adverse decision unconstitutional in providing no method of supersedeas pending court review of an adverse finding was error. The court in its opinion cites Alabama cases to the effect that supersedeas is within the power of the courts without statutory authority therefor. In addition, State Board Rule No. 1 provides for automatic supersedeas pending any appeal from an adverse decision and the above holding that this section of the optometry law was unconstitutional is error.

The court committed error in holding that the State Board of Optometry is illegally constituted in that only about one-half of the participating optometrists of the state may participate in the government of their profession. The stipulation, paragraph 7, states the Alabama Optometric Association consists of approximately 100 members. The statement that 192 optometrists are licensed in Alabama is not contained in the stipulation and no doubt came from arguments or one of the briefs. Neither is it mentioned in the pre-trial order. Had it been known that the court would assume that there were 92 optometrists employed by other persons or other entities, just as were the plaintiffs herein, the correct figures would have been immediately forthcoming. These disclose that at the time this suit was filed 113 optometrists were members of the Association and that less than 40 optometrists were employed by other persons or entities such as Lee Optical Company of Alabama, Inc. This leaves 39 optometrists who have their own individual professional practice and for various reasons have elected not to apply for membership in the Association, membership in which is purely voluntary, and in light of these figures, had they been requested, they would show the Alabama Optometric Association is truly representative of the optometrists in Alabama.

Through inadvertence in paragraph 6 of the stipulation, it shows Dr. Ashbee as a member of the State Board at the time of the filing of the complaint and charges against plaintiffs. Dr. George W. Posey was a member at that time and Dr. Ashbee replaced him, upon the expiration of his term, some two or three years later. Since going off

of the State Board, Dr. Posey did not continue his membership in the Alabama Optometric Association. Also through inadvertence in paragraph 7 of the stipulation, the reference to American Optical Association should have been American Optometric Association.

In Alabama the question was well settled that optometry is a profession in the health care field prior to the recent decision in the Lee Optical case (decided March 30, 1972, 261 So.2d 17, and discussed later in this Brief). In the case of *Hampton* v. *Bracken's Jewelry Company* (1939), 137 Ala. 212, 186 So. 173, the Alabama Supreme Court, in the opinion in this case, lays the legal predicate upon which relief is sought in these cases by the State Board of Optometry because plaintiffs are charged with violation of several sections of the optometry law as set out in the charges against Dr. Sparks, Appendix C, p. A4, and should be granted by the Court. From the body of the opinion we quote as follows:

> "The Legislature recognized the fact that no one, without the requisite skill and knowledge, should be allowed to practice optometry, and hence by Section 2880 of the Code a standard examination is required, which shall consist of tests in practical, theoretical and physiological optics, in theoretical and practical optometry, and in the anatomy and physiology of the eye and in pathology as applied to optometry.
>
> "Thus it would appear that the Legislature has seen proper to recognize and regard optometry as a profession, one requiring knowledge of the functioning of the eye, its anatomy, and the pathology as applied to optometry."

In *Busch Jewelry Company, et al.* v. *State Board of Optometry*, 62 So.2d 770, the Mississippi Supreme Court upheld the injunction issued by the Chancellor of the Chancery Court in Hinds County, Mississippi, wherein he held the following:

> "The Court further finds that Dr. Dooley is not practicing medicine and is only a 'front' for the defendant, Busch Jewelry Company, to practice optometry.
>
> * * * * * *
>
> "It is further the opinion of the Court that the Defendant Busch Jewelry Company, did not employ Dr. Dooley because of any learning or knowledge of the eye that he may have, but solely for the purpose of the practice of optometry by the defendant jewelry company. The defendant, Dr. Dooley, cannot work for the best interest of the unfortunate persons coming into the jewelry store for examination of eyes, but is working solely for the best interest of the defendant jewelry company. In order for the defendant, Dr. Dooley, to receive his pay it is necessary that he prescribe glasses to be sold to the patients by the defendant jewelry company."

Upon appeal, the Mississippi Supreme Court upheld the decision of the lower court and used much the same language in doing so. Busch Jewelry Company and its employee, Dr. Dooley, then appealed this decision of the Mississippi Supreme Court to the United States Supreme Court on certiorari and the Supreme Court denied certiorari—346 U.S. 83, 98 L.Ed. 354, 84 S.Ct. 34.

This brings us to what is often called the Oklahoma case of *Lee Optical of Oklahoma, Inc., et al.* v. *Mac Q. Wil-*

liamson, Attorney General of the State of Oklahoma, et al. This Lee Optical of Oklahoma is a subsidiary of the parent Lee Optical Company in Dallas, Texas, just as Lee Optical of Alabama is. This suit was instituted in the District Court of Oklahoma to have an Oklahoma law declared unconstitutional for the reason it allegedly violated various provisions of the Federal Constitution much as the plaintiffs in the case at bar have attacked Sections 192 and 206 of the Alabama Optometry Law. The matter was heard by a District Court of three judges. Upon appeal from the three-judge Court decision, 120 F.Supp. 128, to the U. S. Supreme Court the statute dealing with advertising and other questions of eyeglass fitting and held (75 Sup.Ct. 461, 348 U.S. 483) the statute to be constitutional, a part having been declared unconstitutional by the three-judge Court. In this case we find the following in the opinion:

> "An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate on effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. Semler v. Dental Examiners, supra. (294 U.S. 608) The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat

all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers.

"Fourth, the District Court held unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment, the provision of § 4 of the Oklahoma Act which reads as follows:

"'No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.'

"It seems to us that this regulation is on the same constitutional footing as the denial to corporations of the right to practice dentistry. Semler v. Dental Examiners, supra. It is an attempt to free the profession, to as great an extent as possible from all taints of commercialism. It certainly might be easy for an optometrist with space in a retail store to be merely a front for the retail establishment. In any case, the opportunity for the nexus may be too great for safety, if the eye doctor is allowed inside the retail store. Moreover, it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism. Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds."

These Supreme Court cases are quoted first to show that optometry cases and commercialism have been before the Supreme Court in other cases and secondly because th

same Legislative Act that repealed Section 210 of the Optometry Law drastically limited the right of advertising by also amending Section 211. While this Section is not directly an issue in this case yet it shows how advertising brings customers to Lee Optical and to the optometrist, either employee or lessee.

With reference to Stipulation 12, p. A41 in this case, the plaintiffs if called to testify, would testify that Lee Optical Company of Alabama, Inc., had never interfered with their professional practice or professional judgment. In this connection, there are cases which hold that a 10-day cancellation clause in an employment or lease contract between a corporation and optometrist or physician is an exercise of control by the corporation over the optometrist and the nature of his handling patients and the eye examination he conducts. The case of *State ex rel. Beck* v. *Goldman Jewelry Co.*, 51 P.2d 995, involved a situation where the company leased space to a licensed optometrist with a 10-day cancellation clause in the lease. In holding the Jewelry Company was unlawfully practicing optometry the Supreme Court of Kansas said:

> "* * * An examination of the contract between the defendant corporation and its employee Jacobs shows the lack of Jacob's control, for the company can dispense with his services on ten (10) days notice whenever it concludes he is not producing enough sales of glasses to those referred to him for tests of the eyes."

There are other such cases cited in the case of *Sears Roebuck & Co.* v. *Mississippi State Board of Optometry*, 213 Miss. 710, 57 So.2d 726.

The fact that Lee Optical was able to change all of its optometrists from that of employees to lessees almost over night by phone in itself shows control over the optometrists by Lee Optical. In addition on page 328 of the record or transcript of the testimony of Dr. Gene Shanbaum in the Lee Optical case, he being an official of the Company, said if a lessee optometrist of theirs sent too many of their customers to another outside optometrist over an extended period of time for an examination he would probably cancel his lease. While the questions and answers represented an exaggerated situation it nevertheless demonstrated that the 10-day cancellation clause was a method of control over the lessee optometrists.

While the defendants deny there was any wrong-doing on the part of the members of the State Board in the handling of these charges from the time they were filed in 1965, and continued from time to time by agreement of counsel, we, nevertheless, quote from the case of *Wagner v. Ezell*, 154 S.E.2d 731, on the question of whether there was any impropriety in Dr. Gibon's verifying the bill of complaint filed in the Circuit Court at Montgomery against Lee Optical and the plaintiffs, we quote as follows from the body of this case:

> "The fact, standing alone, that a Board member, acting within the scope of his proper ministerial functions, participated in the origination of the charges against a licensee is not grounds for disqualification.
>
> "In an Annotation appearing in 97 A.L.R.2d 1210, 1214, entitled *Disqualification, for bias or interest, of member of occupation or profession sitting in license revocation proceeding*, it is said:

'Absent a showing of some other prejudice, bias, or interest, the fact that a member of the hearing tribunal sitting at the license revocation or suspension proceedings also belonged to the professional or occupational organization which initiated or prosecuted the charges against the licensee is not sufficient reason to disqualify the member.'

"And then continuing at Page 1215 of this same Annotation:

'There is authority from several jurisdictions that disqualification for bias or interest will not result where the hearing body or its subordinates, acting within the scope of their proper ministerial functions, participated in the origination of charges against the licensee.'

"The information which came to the attention of the Board members resulting from their investigation is not greatly, if at all, different from the testimony of Wagner himself, and there is no real dispute as to the evidence or facts involved in this case. Disqualification was not required under these facts."

Then, again we quote from this *Wagner* v. *Ezell* case, *supra*, on the question of the optometry law on appeal, merely providing for an appeal to the Circuit Court of the residence of the optometrists against whom an adverse decision has been rendered. We quote from the body of the opinion as follows:

"Failure of the statute to provide for an appeal does not deprive Wagner of adequate review. In the case of Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22, this Court said:

"The law provides no mode of procedure for appeal from the order of the Tax Commission revoking

the license of a retail liquor dealer. It is generally held, however, that the method of reviewing the action of a board or tribunal in revoking a liquor license is by a writ of certiorari, upon the theory that while such bodies do not exercise the "judicial power of the state," as that phrase is used in conferring judicial power upon the courts of the state, they do exercise a quasi judicial power in such matters.'

"Similar review is available to Wagner."

In the case of *Seidenberg, M.D.* v. *The New Mexico Board of Medical Examiners*, 452 P.2d 469, we find more on the question of initiation of charges and we quote from the body of the opinion as follows:

"The Board is the one tribunal vested with power to revoke a doctor's license, just as the Supreme Court of New Mexico is the only body with power to disbar a lawyer. In State ex rel. Yuhas v. Board of Medical Examiners, 135 Mont. 381, 339 P.2d 981 (1959), it was held that the Board had exclusive jurisdiction of the granting and revoking of certificates admitting physicians and surgeons to practice and, in view of the fact statutes do not provide for disqualification of board members, proceedings before the Board may not be restrained merely by reason of the fact that the Board itself initiated the proceedings against a physician and was, therefore, an interested party. See 42 Am.Jur., Public Administrative Law, § 21 at 312; and Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).

"The fact that the charges are made by the same body which tries the issues does not, in itself, operate as a disqualification. Neither does zeal in the performance of a public duty disqualify. 1 Am.Jur.2d, Ad-

ministrative Law, § 64, at 861; New Jersey State Board of Optometrists v. Nemitz, 21 N.J.Super. 18, 90 A.2d 740 (1952).

"In Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936), it was held that disqualification will not be permitted to destroy the only tribunal with power in the premises, although a disqualified member may not act if the law provides for substitution of personnel on the board or court, or if another tribunal exists to which resort may be had.

"* * * The record in the instant case supports the Board's decision by clear and convincing evidence and the decision of the Board is neither unreasonable, arbitrary nor capricious. Appellees, as found by the Board, were guilty of dishonorable and unprofessional conduct and the licenses issued to appellees by the Board should be revoked."

It is a well settled principle of law that a reviewing trial judge cannot substitute his judgment for the judgment of the board following a hearing and this was so held as follows in this *Seidenberg, M.D.* v. *The New Mexico Board of Medical Examiners, supra:*

"We hold that the trial judge substituted his judgment for the judgment of the Board; therefore, the decision of the trial court is reversed and the case remanded with instructions to affirm the decision of the Board.

"It is so ordered."

Again from *Seidenberg, supra,* on the question of constitutionality of a legislative act requiring that Board members be appointed by the governor from a list of 5 nominees for each position from the State Medical Society, the con-

stitutionality of this act was questioned and in the body of the opinion, we find as follows:

"Appellees do not challenge the right of the legislature to create a Board of Medical Examiners and to vest authority in the Board to institute appropriate disciplinary proceedings for the revocation or suspension of a physician's license to practice medicine. They do complain, however, that the statute creating the Board has usurped the governor's power of appointment of members of the Board by restricting the governor's choice to nominees of the New Mexico Medical Society.

"In accordance with § 67-5-1, supra, the nominees submitted by the Medical Society must be 'qualified.'

"Appellees rely on State ex rel. Swope v. Mechem, 58 N.M. 1 at 6, 265 P.2d 336 at 339 (1954), wherein we quoted from 42 Am.Jur., Public Officers, § 94 at 952:

'* * * where the Constitution makes the act of appointment an executive one, it cannot be exercised by the legislature, nor can the legislature rob the executive of such power by conferring it on an outside agency of its own choosing.'

We distinguish this from the instant case in that we are not faced with a constitutional delegation to the executive of the power of appointment to the Board. Here, the legislature delegated such power to the executive and may establish qualifications for Board members. New Mexico Constitution, Art. VII, § 2(B), (1967 Pocket Supp.) provides:

'The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.'

"It is to be noted that the Board appointed by the governor has the power to grant licenses to qualified

physicians to practice medicine, yet appellees contend that the Board could not revoke their licenses to practice. This is incongruous and not a tenable position in so far as appellees are concerned. See, Annot. 65 A.L.R.2d 662 at 682.

"The constitutionality of a statute is presumed. Doubts concerning its constitutionality are to be resolved in favor of legality and, before a statute may be stricken down, it must clearly appear that it offends applicable constitutional provisions. See, Community Public Service Co. v. New Mexico Public Service Comm'n, 76 N.M. 314, 414 P.2d 675 (1966); Silver City Consol. Sch. Dist. No. 1 v. Board of Regents, 75 N.M. 106, 401 P.2d 95 (1965), and cases cited therein.

"In the Annot. 97 A.L.R.2d 361 at 373, commenting on Marks v. Frantz, 179 Kan. 638, 298 P.2d 316 (1956), we find the following:

> '* * * [P]laintiff sought (1) a determination that an act creating a board of examiners for the examination and registration of optometrists was invalid in that it directed the governor to appoint members of the board from a list of names supplied to him by the Kansas optometric association, thus depriving the governor of his power of appointment and conferring it on a private corporation in violation of the state constitution, * * *. Relying on what is deemed the "clear weight of authority" in other jurisdictions, the court upheld the constitutionality of the statute, noting that many examples of restrictive powers of appointment were to be found under various state statutes, indicating a settled legislative pattern.'

"The governor is obligated to appoint to the Board nominees submitted by the New Mexico Medical Society, and only the governor has this prerogative."

Question No. 4

Whether the court erred in enjoining the State Board of Optometry and their successors in office from hearing these pending charges against the plaintiffs because of alleged pecuniary gain, bias or prejudice, before a hearing, when mandamus is provided in the Alabama law to test these questions with right of full hearing in court.

The plaintiffs allege bias, prejudice and pecuniary interest as grounds for disqualification of the members of the State Board of Optometry from proceeding with a hearing of the charges pending before it against the plaintiffs herein. This question in varying aspects has been before the courts many times. It is the contention of the defendant members of the State Board of Optometry that they are not biased or prejudiced against the plaintiffs and they are not and should not be disqualified from hearing these charges. There are cases which hold to the effect that the board hearing charges against a person is, strictly speaking, merely performing an administrative action and a board member who was prejudiced or biased against the accused is not disqualified. *Dyment* v. *Board of Medical Examiners* (1928), 268 Pac. 1073; *Winning* v. *Board of Dental Examiners* (1931), 300 Pac. 866.

This case involves an effort on the part of the plaintiffs to disqualify the members of the Alabama State Board of Optometry and to enjoin them from hearing the charges pending against them. The *Miller* v. *Aldridge* case, 103 So. 835, cited by the plaintiffs and the trial court in support of their position and contention, holds that the proper remedy to compel members of a state board to recuse themselves as disqualified to pass on a petition for

revocation of certificate is by mandamus. This procedure was not followed in this case but instead the plaintiffs filed this suit in federal court. Also in the *Miller* case, the Court cites the "doctrine of necessity" which is recognized by other authorities and requires that they should hear and determine the cause citing 15 R.C.L., page 541, in which is found the following:

> "It is well established that the rule of disqualification of judges must yield to the demands of necessity, as, for example, in cases where if applied it would destroy the only tribunal in which relief could be had."

Cited as in support of the text are: *Bliss* v. *Caille Bros. Co.*, 149 Mich. 601, 113 N.W. 317, 12 Ann.Cas. 513; *In re Ryers*, 72 N.Y. 1, 28 Am.Rep. 88; *Galey* v. *Montgomery County*, 174 Ind. 181, 91 N.E. 593, Ann. Cas. 1912C, 1099; *State* v. *Polley*, 34 S.D. 565, 138 N.W. 300, 42 L.R.A. (N.S.) 788.

In this *Miller* v. *Aldridge* case, *supra*, the Court considered the ruling in the *Lehmann* case conclusive against injunctive relief. The Supreme Court in the *Lehmann* case, 263 U.S. 394, 44 S.Ct. 128, 68 L.E. —, said:

> "We cannot * * * assume that the board will be impelled to action by other than a sense of duty to render judgment, except upon convincing evidence introduced in a regular way, with opportunity of rebuttal."

Since the hearings have not been held on the charges pending before the State Board against the plaintiffs, we believe the affidavit of Dr. James L. Cash to be of significant importance in passing on the questions here involved and his affidavit is attached as Appendix H, p. A31. Also,

the affidavit of Dr. Adams, previously attached as Appendix D, takes on added significance on the question of whether the defendant State Board of Optometry should be permitted to proceed with a hearing on these charges.

Again, returning to 97 A.L.R.2d, page 1214, we find the following:

Absent a showing of some other prejudice, bias, or interest, the fact that a member of the hearing tribunal sitting at the license revocation or suspension proceedings also belonged to the professional or occupational organization which initiated or prosecuted the charges against the licensee is not sufficient reason to disqualify the member.

"Colorado.—State Board of Dental Examiners v. Miller (1932) 90 Colo 193, 8 P2d 699, cert den 287 US 563, 77 L ed 496, 53 S. Ct 6; State Board of Dental Examiners v Patch (1932) 90 Colo 207, 8 P2d 704; State Board of Dental Examiners v Walsh (1932) 90 Colo 208, 8 P2d 704.

"Illinois.—See Bruce v Department of Registration & Education (1963) 26 Ill 2d 612, 187 NE2d 711, supra § 2[b].

"Louisiana.—Michon v Louisiana State Board of Optometry Examiners (1960, La App) 121 So 2d 565."

In 97 A.L.R.2d, page 1215, we find there is authority from several jurisdictions that disqualification for bias or interest will not result when the hearing body acting within the scope of their proper ministerial functions, participated in the origination of charges against the licensee.

"United States.—Brinkley v Hassig (1936, CA10 Kan) 83 F2d 351, infra § 4[a].

"California.—Berry v Alderson (1922) 59 Cal App 729, 211 P 836; Winning v Board of Dental Examiners (1931) 114 Cal App 658, 300 P 866.

"Florida.—Hogan v State (925) 89 Fla 388, 104 So 598 (judge held not legally disqualified from proceeding with a disbarment action which he had caused to be commenced pursuant to statute).

"Illinois.—Tarr v Hallihan (1940) 375 Ill 38, 30 NE 2d 421 (where charges against a dentist were filed by an employee of the department which appointed the dentists to sit on the revocation examining committee).

"Minnesota.—Reyburn v Minnesota State Board of Optometry (1956) 247 Minn 520, 78 NW2d 351.

"Montana.—State ex rel. Yuhas v Board of Medical Examiners (1959) 135 Mont 381, 339 P2d 981.

"New Jersey.—Gross v New Jersey State Board of Optometrists (1933) 11 NJ Misc 485, 167 A 25."

While it is undisputed that the charges in this case were initiated by the Alabama Optometric Association through its president, Dr. Roy Adams, rather than by the State Board or any member thereof, the contention of the plaintiffs for disqualification of the State Board in this regard is without merit. While it is true that Dr. Thomas Gibson verified the bill of complaint of the suit filed against Lee Optical Company of Alabama, Inc., and the plaintiff optometrists, his deposition testimony indicates that he did so without going into the merits of the case or forming any conclusion with reference to the plaintiff optometrists and thus in performing a purely ministerial act, should not be disqualified.

Counsel for plaintiffs in their memorandum brief on the merits of the case (R. 548) pending before the three-judge hearing tribunal, states, beginning on page 4, that:

> "The involvement of state board members in the investigation and institution of charges against the plaintiffs and the involvement of the board members with the Alabama Optometric Association in securing passage of legislation, the violation of which is the basis of charges brought herein, is illustrated in the minutes of the State Board of Optometry attached as an exhibit to the deposition of Dr. Willard Smith's testimony. A cursory examination of those minutes from August 20, 1965 to the present are shown in the Record now on file and shown in the index (App. G beginning on page 4 of Plaintiffs' Brief which starts at page 548)."

An examination of the excerpts from these minutes clearly shows that any discussion between themselves and their legal counsel had to do with the status of the lawsuit (pending over a 5-year period from filing to trial) and particularly the one against the plaintiffs herein and the corporate employer, Lee Optical Company of Alabama, Inc., after the defendant optometrists had gone out on demurrer. In every instance quoted from the minutes the discussion involved litigation pending and one instance where the State Board accepted the Association's recommendation as to employment of Board counsel. In only one other instance in the quoted minutes was any reference made to charges presented to the Board and this was on another optometrist who is not a party to this suit and as reflected by the minutes, the Board merely instructed its attorney to proceed against the individual optometrist. There is nothing here which indicates bias, prejudice or

any disqualifications of the Board to hear the pending charges.

Again, quoting from 97 A.L.R.2d, page 1219, in the case of the *Board of Medical Examiners* v. *Stewart* (1954), 102 A.2d 248 (Md.), the Court of Appeals expressed the opinion that there was error in declaring that the rehearing of the revocation proceedings should be held before a completely different board because all of the doctors on the first board were legally prejudiced by having already publicly committed themselves to an adverse interpretation in the void order of revocation. "While the high court acknowledged that due process requires that a fair and impartial hearing be given in cases of license revocation, it pointed out that disqualification will not be permitted to destroy the only tribunal with power in the premises, and then continued to its major holding that the general rule that a judge who presided at the trial of a case which is reversed and remanded for a new trial is not disqualified to retry the case, unless there is a contrary statutory provision, undoubtedly applies to members of administrative agencies because usually the procedure of such agencies is less strict and formal than that of the courts. On this reasoning, the court concluded that the lower court opinion of disqualification was not binding upon the board."

Again from page 1221, 97 A.L.R.2d, on the question of pecuniary interest on the part of the Board members, we find the following:

"Where a beauty school owner and operator whose students also performed services for the public challenged the appointment of two beauty shop operators as committee members to sit at a hearing on a com-

plaint praying for the revocation or suspension of her occupational licenses, on the basis that they were her competitors and thus disqualified as having a pecuniary interest in the matter, the court in State ex rel. Beddall v Lonctot (1963) 62 Wash 2d 845, 384 P2d 877, 97 ALR2d 1201, found no defiance of due process where the legislature, acting within its permissible discretion, had decided that qualified practitioners of the same calling are competent to be hearing examiners in a revocation proceeding of other members. In refusing to single out one group within the calling as disqualified, the court noted that the pecuniary interest of the appointed shop owners was speculative and indirect, and that, in any event, having one competitive group within the calling dominate a licensing committee was not in itself a violation of due process."

In the few cases within the scope of this annotation where the question of equal protection has been discussed, the courts have decided on the basis of whether or not there was sufficient specific evidence present to support the charge of bias. Defendants state as a positive fact there is no such evidence in this case and further by Stipulation No. 11, p. A40. Also the Board members say they will render a fair and impartial decision if permitted to hear these charges. 97 A.L.R.2d 1222.

The "Rule of Necessity" is held to apply in some instances and would certainly be applicable in this case since there is no statutory provision for reappointing another state board in the event the present board is not permitted to hear these charges. Beginning on page 1222, 97 A.L.R.2d, we find the following:

"There is an exception, based upon necessity, to the rule of disqualification of an administrative officer, to

the effect that disqualification will not be permitted to destroy the only tribunal with power to act, or to prevent an otherwise disqualified officer from acting if his failure to act would result in a failure of justice. This exception has been applied in several cases involving license revocation or suspension proceedings wherein a member of the hearing body, who was also a member of the licensee's profession or occupation, was alleged to have been disqualified by bias or interest.

"United States.—Brinkley v Hassig (1936, CA10 Kan) 83 F2d 351.

"Arkansas.—Measles v Owens (1932) 185 Ark 106, 46 SW2d 40.

"Indiana.—Stone v Fritts (1907) 169 Ind 361, 82 NE 792, 15 LRA NS 1147.

"Maryland.—Board of Medical Examiners v Steward (1954) 203 Md 574, 102 A2d 248, supra § 3[d].

"Montana.—State ex rel. Yuhas v Board of Medical Examiners (1959) 135 Mont 381, 339 P2d 981."

Further supporting the rule of necessity, Lee Optical Company of Alabama, Inc., the employer of the plaintiffs herein at the time these charges were filed, advertised extensively throughout the State of Alabama that their one low price included "a scientific eye examination" and other similar phrases so it would have been impossible for the State Board members to not have some general knowledge of the claims and advertising of the employer of the plaintiffs herein who continued to conduct eye examinations and condoned this advertising for almost three months, up until the time these charges were filed, when the advertisements were changed some but as held by the Circuit Judge in the Lee Optical trial in Circuit Court at Montgomery,

in his dicree, "the advertising was not thereafter changed to any great extent." In this case, the statute provides the State Board as the only tribunal with the power to revoke an optometrist's license and thus, the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises must be applied. In the case of *Brinkley* v. *Hassig* (1936), C.A. 10, Kan., 83 F.2d 351, the Court emphasized that absent such provisions for substitution of personnel or tribunal, then

> "The law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal. The Court concluded by adopting the language of the trial court: 'The members of the board were not disqualified because they knew of [the plaintiff's] methods prior to the hearing and condemned them. [His] methods were so notorious that ignorance of them by members of the board was an impossibility and such knowledge compelled condemnation.' "

Question No. 5

Whether the court erred in finding the plaintiffs had been harassed by defendants to their irreparable damage on the evidence before it.

Defendants urge that there has been absolutely no evidence of harassment of the plaintiffs as alleged in their complaint. Plaintiffs argued that they had been in litigation with the State Board in three cases prior to the filing of the Lee Optical case and the plaintiffs as their employer. Two of these suits involve Board rules and one involved a city ordinance of Bessemer, Alabama, and it was filed by Busch Jewelry Company. Neither the State Board nor

the plaintiffs were involved in any way in this suit. The first case was *Alabama State Board of Optometry* v. *Busch Jewelry Company*, 261 Ala. 479, 75 So.2d 121 (October 7, 1954). The second case was *Busch Jewelry Company* v. *City of Bessemer*, 269 Ala. 180, 112 So.2d 344 (May 21, 1959), and the third case was filed against the State Board attacking regulations that had been adopted by the State Board, and this Dr. McCrory is one and the same as the Dr. McCrory shown as a plaintiff herein and was an employee of Lee Optical. This is the case of *William B. McCrory* v. *William C. Wood, et al.*, members of the State Board of Optometry and Alabama State Board of Optometry, decided by the Supreme Court of Alabama, on January 21, 1965, and reported in 171 So.2d 241. This decision was rendered on January 21, 1965, some ten months prior to the filing of the charges involved herein. Certainly there was no harassment of the plaintiffs or anyone indicated by these suits and the record of trial of the case now before this Honorable Court (Stipulation of Facts, Appendix J, p. A37), shows no acts of harassment against them or acts of disqualification on the part of the State Board members. As a matter of fact, paragraph 11 of the stipulation states that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against the plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

The defendants therefore urge that the plaintiffs have failed to support their burden of proof in support of their charges of harassment, bias and prejudice on the part of

the State Board members. The court erred in holding that since the individual members of the State Board of Optometry are substantially the same individuals who signed affidavits in 1965, stating or supporting proceedings charging that the plaintiffs had committed the violations charged in the proceeding, and conviction of the offenses charged and suspension of licenses are but predetermined formalities with no element of a fair trial. The undisputed testimony is that Dr. Thomas Gibson, member of the State Board, is the only one who signed anything and that was the verification of the bill of complaint against Lee Optical Company of Alabama, Inc., and the plaintiffs as employed optometrists and it was error to hold that conviction and suspension of licenses was but predetermined formalities with no element of a fair trial.

Question No. 6

Whether the court erred in assuming from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiffs.

A proceeding such as this could never reach all the facts and issues because they would be limited to a relatively small part of the overall picture. Actually this proceeding puts the members of the State Board of Optometry on trial for alleged bias, prejudice and pecuniary gain and leaves out the major issue of whether the plaintiffs have violated the optometry law and should be answerable to the only tribunal created by law and qualified to pass on the evidence presented to it by both sides. A reading of the decree in the *State Board of Optometry* v. *Lee Optical* case

in Circuit Court at Montgomery will point up many of the questions of fact that both sides could never agree and stipulate on. This Lee case is now pending on appeal before the Alabama Supreme Court. The trial judge made his findings on the conflicting evidence before him in the state court Lee trial. One of the many instances of this would be on the steps necessary to make a thorough examination. The order and opinion of the three-judge tribunal in the lower court was based on the facts that the respective parties could agree on but which are obviously only a few of the controversial questions as reflected in the state trial court Lee decision. Notwithstanding this, the three-judge trial court found from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiff optometrists. The court erred in assuming as it did throughout its opinion that as a result of any hearing before the State Board of Optometry their decision would be one of revocation of license. From a study of the reported cases herein and elsewhere, it is obvious that revocation of license is a penalty seldom meted out by a licensing board in any of the licensed professional groups. Usually there is a suspension for a reasonably short time and this is often followed by probation. It has been stated many times by the attorneys for the State Board of Optometry that they had no desire to run these plaintiff optometrists or any optometrists similarly situated out of Alabama because they are needed in Alabama in their own professional practices serving the needs of the people in the community where they practice with their allegiance running directly to their patient and no one else. This need is demonstrated by

the fact that in 1969 the Alabama Legislature established a school of optometry and directed that it be located in the University of Alabama Medical Complex at Birgmingham, Alabama, and it now has third-year students (1972) in this optometry school (Stipulation 14, p. A41). The *Bracken Jewelry* case, *supra*, not only holds optometry to be a profession in Alabama but also points out the obligation of an optometrist or any other professional man is the welfare of his patient and not the corporate employer or lessor whose primary interest is his search for profits in the marketplace (*Sears* v. *Mississippi* case, *supra*) so a professional man cannot properly and lawfully serve two masters—the corporate entity and his patient.

The *Lee Optical* case decided by the Circuit Court at Montgomery, Alabama, and appealed by the defendant therein to the Alabama Supreme Court has now been decided. *Lee Optical Co. of Alabama* v. *State Board of Optometry*, 261 So.2d 17, March 30, 1972, *rehearing denied* April 27, 1972. It reversed the decree of the lower court and directed a dismissal. This is not the forum in which to disagree with this opinion but for fear it might appear at first blush that this decision renders moot this pending appeal before this Honorable Court we would like to invite the attention of the Court to several inconsistencies and oversights in this opinion that we feel will be helpful in passing on the case at bar.

The state court made crystal clear that only medicine, law and theology were learned professions and with this no one will disagree. Unfortunately for the State Board of Optometry, appellee, the court overlooked the

fact that one of the employee-lessees of Lee Optical, appellant, was a physician and identified as such in the Bill of Complaint, see Appendix D, p. A21 of appellee's motion to dismiss wherein appellants' Bill of Complaint is set out in full and it affirmatively shows that one of the defendants was Mr. William J. Craig, M.D., in the caption and at paragraph 4 of the Bill he is further identified as a physician and in the Lee Optical store at 115 No. Foster, Dothan, Alabama, as their employee refractionist, later changed to lessee, and was so employed at the time of the repeal of Section 210 and when the suit here involved was filed and was at the time of trial and decision in the lower court and when this case was decided by the Alabama Supreme Court even up to the present time. In the opening paragraph of the opinion by Mr. Justice Harwood he refers to the fact that this physician, Dr. Craig, was one of the original defendants in this case who went out on demurrer in the lower court but this still leaves the question before the Alabama Supreme Court of Lee Optical employing optometrists and a physician and while it was held that corporations could employ optometrists the court held that members of the learned professions could not be so employed and appellants were entitled to an affirmance of the injunction issued by the lower court enjoining Lee Optical from employing physicians. This question of Lee Optical employing a physician was raised in both appellees' brief and application for rehearing but it is not mentioned in the court's opinion. This is important because the State Board of Optometry has no jurisdiction over the license of a physician issued by his medical board but this Honorable Court and many other courts have upheld the

challenge of an optometry board to enjoin the employment of a physician by a corporation to refract the eyes of its customers for the purpose of enabling the corporation to sell eyeglass frames and lenses. *Busch Jewelry Co.* v. *Mississippi State Board of Optometry*, 62 So.2d 770, certiorari to U. S. Supreme Court denied 346 U.S. 83, 98 L.Ed. 354, 84 S.Ct. 34.

The Alabama Supreme Court committed grievous error in failing to enjoin Lee Optical from employing physicians because in other states there are instances where corporations would dispense with the services of an optometrist, when charges were filed against him before the Optometry Board and replace him with a physician whose license could not be touched by the Optometry Board on charges before it against a physician.

Again the state trial court in Alabama quoted from the *Busch Jewelry* case in Alabama (decided October 7, 1954, 75 So.2d 121) as shown on page A18, Appendix E, as follows:

> " 'This court is convinced that the repeal of Section 210 and the amendment of Section 211 was a recognition by the Alabama Legislature that this state was out of step with the rest of the nation in dealing with the profession of optometry, and that it was not in the best interest of Alabama citizens to maintain the statutory distinction between the practice of optometry and the other professions in the health care field.
>
> " 'This action by the Legislature taken in the light of the two *Busch* cases and the *McCrory* case seems to declare a public policy against the corporate practice of optometry, whether it be direct or by indirection. It must be assumed that the Legislature, in repealing

Section 210 and amending Section 211 took into consideration the following statement by the Alabama Supreme Court in *Busch Jewelry et. al.* vs. *Alabama State Board of Optometry:*

> "If there is to be a change in the Legislative policy therein expressed, (Sections 210 and 211) that is a matter for legislative action."

" 'The general rule regarding the corporation practice of optometry is:

> "It is generally held that in the absence of express statutory authority, a corporation may not engage in the practice of optometry either directly or indirectly through the employment of a duly registered optometrist." *13 Am Jur,* Corporations, Section 837.

" 'The Court feels that this role holds twice true when such "express statutory authority" is repealed by the Legislature, in the face of court decisions expressly construing the statute to allow such practices.' "

A short time later, on August 4, 1965, Section 210 was repealed and 211 amended. It seemed clear to legislative leaders and others that the repeal of Section 210 was the best way to proceed because it appeared to clearly remove the statutory authority for a corporation to practice optometry either directly or indirectly through the employment of a duly registered optometrist or physician.

Again the Supreme Court in this case pointed out that the optometry law in Alabama was adopted by the Legislature in 1919 yet they rely on and quote from Arrington's History of Optometry (1929) just 10 years later and most all other cases cited in support of their conclusion that

optometry was merely a trade and optometrists could be employed by anyone and their services offered to the public go back 30 years or more. We have tried to point out in our briefs heretofore filed in this cause that the later and more current cases on optometry clearly recognize it as a profession in the health care field and in fact is now the third largest provider of such services, medicine and dentistry being first and second. Also it would be interesting to go back 45 years to the cases dealing with commercialism in medicine, dentistry and law. It is unfortunate that the ophthalmologists, a specialty group in medicine treating diseases of the eye by drugs and surgery, feel that optometrists are their competitors in the eye care field despite the severe limitations in optometry laws on what an optometrist can do. Additionally optometrists are the greatest source of referrals to opthalmologists for disease and surgery. Evidently there is another section in medicine that has a similar feeling about "medical technicians, registered nurses, practical nurses, pharmacists, chiropodists, and perhaps others" or why would would the Alabama Supreme Court voluntarily group these licensed professionals in the health care field in the category of a trade as was done with optometry.

There are many other holdings in this Lee Supreme Court decision that are inconsistent with numerous later state court decisions and even some of this Honorable Court. Our discussion of this recent Lee decision may seem long for inclusion in this brief but we want to emphasize that it deals only with the matter of employment of optometrists and we quote the exact words as used by the Court as follows:

"We also wish to note that this proceeding does not involve any misconduct by a duly licensed optometrist. It is solely against Lee which does not, and indeed could not, obtain a license to practice optometry. The only point involved in this proceeding is whether it is unlawful for Lee to employ a licensed optometrist, or to permit one to practice on its premises."

It is the contention of appellants that the charges here involved, of which by Stipulation No. 9, p. 49, it is agreed the others are the same as, or sparks, that numerous violations of specific sections of the optometry law are alleged and not disposed of in the Lee opinion.

From a companion case *House of $8.50 Eyeglasses, Inc.*, in which the employed optometrists were held in the case and all of them enjoined from the unlawful practice of optometry, the Alabama Supreme Court reversed this case on the same reasoning as in the Lee Optical case and reported in 261 So.2d 27 on April 6, 1972, and rehearing denied on April 27, 1972. It is interesting to note that in the $8.50 case four of the enjoined optometrists did not join in the appeal and were given statutory notice to do so and upon their failure to do so the appellee State Board filed a motion to dismiss as to them, following statutory and court rules in doing so, which would have left the injunction enjoining them from the unlawful practice of optometry standing but for some reason the Supreme Court made no reference to our motion and failure of their appeal which had they done so and sustained our motion would have made unnecessary a hearing on the other allegations in the charges against them. No further action has been taken against them and none is contem-

plated until this case is finally decided because as we conceive it the questions involved before this Honorable Court deal with constitutional questions and qualifications of the Optometry Board and do not attempt to pass on the merits of the charges pending before the Board other than following the pronouncements in the State Court decisions in the *Lee* and *House of $8.50* cases, *supra*. As a matter of information the other pending lawsuits against other corporations and their refractionists have been dismissed by the Optometry Board but the pending charges are awaiting the final decision of this Honorable Court.

If this Honorable Court sustains the lower court in this matter, and the injunction against the Alabama State Board of Optometry and their successors is upheld, prohibiting them from hearing the remaining charges against the plaintiffs now pending against them, then these optometrists would be free to continue the conduct alleged in the charges in Alabama and the State Board of Optometry would be unable to cope with this matter because not only the defendant members of the Optometry Board are enjoined but also their successors in office and since this is the only tribunal created by law in Alabama to hear any such charges when filed before it, there could never be a hearing on such charges before the State Board.

If on the other hand, this Honorable Court directs a reversal and dismissal of the decree of the trial tribunal, the plaintiffs are afforded an adequate remedy in Alabama because they can test the qualifications of the State Board members by a mandamus proceeding in the state court where there would be ample opportunity for the plaintiffs

to present their claims of disqualification and the individual board members would be given an opportunity to testify in court on the matters presented and so long as a quorum of three Board members are left, a hearing on the charges could be held.

In the event of a reversal and dismissal in this case and the plaintiff optometrists passed up their right to file a mandamus proceedings and stood trial before the State Board where, by law, they would be given ample opportunity to cross-examine witnesses, be represented by counsel and produce witnesses on their own behalf and if the State Board reached a decision that was not objectionable to the individual optometrists, then there would be no reason to carry the matter further. If such ruling was objectionable they have the right of appeal all the way up to the Alabama Supreme Court as pointed out heretofore in this brief. Any preserved federal question could be reviewed by this Honorable Court on application for certiorari.

The situation in this case is quite unusual in that this federal court suit was filed before there had been a hearing before the State Board. Almost all of the other reported cases involved appeal procedures either in state court or the federal courts after the record was made before the State Board and a decision reached and announced by it. This has been described as a drastic procedure in other civil and criminal matters as we will point out later with citations in this brief. We, therefore, urge with all the power at our command that this Honorable Court give the utmost consideration to the impact of the opinion heretofore rendered by the trial court not only upon optometry

in Alabama but its impact on all licensing boards throughout the country. There are many similarly appointed Boards serving just as this State Board and this would upset the entire system of professional licensure now written into the laws of practically every state.

Question No. 7

Whether the court erred in overruling defendant's motion to dismiss this action.

We urge that the trial court committed error in overruling defendants' motion to dismiss this action. This motion was included and brought along at each stage of the pleadings in this case. We feel that Sections 192 and 206, Title 46, of the optometry law, Code of Alabama, are constitutional, having been so held in *McCrory* v. *Woods*, *supra*, by the Alabama Supreme Court and in keeping with the additional cases cited under Questions Presented, No. 1 and No. 2, *supra*.

This involves a situation where charges that were pending against each of the plaintiffs before the defendant State Board were scheduled for hearing and before any hearings were held on these charges, this suit was filed resulting in the injunction herein against the State Board and their successors in office from conducting hearings on any of these charges. This presents a different situation to most of the reported cases where suit is filed in federal court after the hearing has been held and a decision rendered by the State Board. On the basis of the stipulation herein and the pretrial order, we do not believe there are sufficient facts shown to either disqualify the State Board

for bias, prejudice, pecuniary interest or harassment as charged.

In *Miller* v. *Aldridge*, 103 So. 835, the Alabama Supreme Court held the proper remedy to be by mandamus to compel members of a State Board of Accountancy to recuse themselves as disqualified to pass on charges for revocation of a certificate to practice, p. 838, and in doing so quoted from *Lehmann*, 263 U.S. 394, 44 S.Ct. 128, 68 L.Ed. 354, as well as the cases cited on page 839; *Ex parte State Bar Association*, 82 Ala. 113, 8 So. 768; *McConnell* v. *Goodwyn*, 189 Ala. 390, 66 So. 675, Ann.Cas. 1917A, 839. Since the order of this Court disqualified not only the present members of the State Board of Optometry but their successors in office as well, this destroys the only tribunal established by law in Alabama to hear the charges and thus it becomes imperative that the plaintiffs be required to pursue the proper remedy of mandamus in Alabama where a full hearing could be held in court on the question of disqualification with the right of appeal available to either side. If the court in such a proceeding found the board members disqualified, then an appeal could be made to the Alabama Supreme Court just as it was in this *Miller* v. *Aldridge* case. In the case of *Beam* v. *Fulwiler*, 456 P.2d 325, the Supreme Court of Washington held that where a hearing board is disqualified and there is no provision for another tribunal to hear the matter, the court is possessed of inherent jurisdiction to hear and determine the controversy on its merits. It is unthinkable that the trial court in this case should be required to hear the charges against each of the plaintiffs after having destroyed the only tribunal provided by law in Alabama to hear the

charges, so this adds impetus to the defendants' contention that this case should be dismissed and let the matter be decided in Alabama either by mandamus in the courts or by hearing before the State Board.

The defendants urge there has been no mixing of functions in this matter of sufficient importance to disqualify the entire membership of the State Board. By Stipulation No. 11, App. J, p. A40, the individual members of the State Board state they would each testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them. There has been no activity shown on the part of the members of the State Board such as that in the *Miller* v. *Aldridge* case, *supra*, and the case of *Mack* v. *Florida State Board of Dentistry*, 192 So.2d 66 (1966), *certiorari denied* 201 So.2d 551 (1967), 296 F.Supp. 1259 (S.D. Fla. 1969), 430 F.2d 862 (C.A. 5, 1970), *certiorari denied* 91 S.Ct. 971 (1971), *rehearing denied* 402 U.S. 925 (1971).

In *Samuels* v. *MacKell*, 91 Sup.Ct. 764 (1971), the appellants charge that trial of the indictments against them in state courts would harass them, and cause them to suffer irreparable damages, and they therefore prayed that the State Board should be enjoined from further proceedings. In the alternative, appellants asked the Court to enter a declaratory judgment to the effect that the challenged state laws were unconstitutional and void for the above and additional grounds set out in the opinion. The three-judge Court hearing this matter held the New York criminal anarchy law was constitutional as it had been construed by the New York courts and held the complaint should therefore be dismissed. 288 F.Supp. 348 (D.C.S.D. N.Y., 1968).

It would appear that an essential element in the *Samuels* case and others is that there must be allegations and proof that a trial of indictments (charges before the State Board here) in state courts would harass them, and cause them to suffer irreparable damages and cited as follows from page 766 of the *Samuels* case:

> "In No. 2, Younger v. Harris, 400 U.S. —, 91 S.Ct. 746, 27 L.Ed.2d —, we today decided on facts very similar to the facts in these cases that a United States District Court could not issue an injunction to stay proceedings pending in a state criminal court at the time the federal suit was begun. This was because it did not appear from the record that the plaintiffs would suffer immediate irreparable damages in accord with the rule set out in Douglass v. City of Jeanette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), and many other cases. Since in the present case there is likewise no sufficient showing in the record that the plaintiffs have suffered or would suffer irreparable damages, our decision in the *Younger* case is dispositive of the prayers for injunctions here. * * *"

In the pending case the constitutionality of Sections 192 and 206 of the Alabama optometry law are alleged to be unconstitutional, but as in *Samuels*, the Alabama Supreme Court had construed these two sections to be constitutional in *McCrory* v. *Wood*, *supra*. Additionally, the plaintiffs charged the trial of the charges before the State Board would harass them and cause them to suffer irreparable damages and prayed for injunctive relief against the State Board, its present members and successors in office, and we would urge, in the present case, that no valid proof of harassment, irreparable damage and bad faith on the

part of the State Board has been proved and if the mere trial of the charges before the State Board would constitute harassment and irreparable damage, then no such charges could ever be tried before any such board. We feel the allegations of harassment and irreparable damages alleged by plaintiffs herein, are without merit.

There is the case of *Henry* v. *First National Bank of Clarksdale*, 444 F.2d 1300, decided June 23, 1971, *certiorari denied* March 27, 1972, 40 L.Wk. 3469, which we feel further supports the motion of the defendants to dismiss, first on the grounds that the Alabama Supreme Court has held Sections 191 and 206 of the Alabama Optometry law to be constitutional, *McCrory* v. *Wood*, *supra*, and, secondly, the mere filing of the charges herein does not in itself constitute harassment or irreparable damage and, as contended by defendants herein, there has not been a sufficient showing on the part of the plaintiffs to show bad faith on the part of the State Board and its members such as would constitute harassment and irreparable damage. Thirdly, in addition to their right of a hearing before the State Board on the charges pending in Alabama, the proper procedure to challenge the qualifications of such Board members is well established as being that of mandamus wherein there could be a full hearing and both sides presented to a court and a decision reached on the alleged disqualification of State Board members. *Miller* v. *Aldridge*, *supra*.

In such a mandamus hearing, the alleged pecuniary interest of the State Board members could be determined. Such a pecuniary interest would have to be substantial to constitute disqualifications as held in the case of *In re*

Heirich (1956), 10 Ill.2d 357, 140 N.E.2d 825, 67 A.L.R.2d 827, *cert. den.* 355 U.S. 805, 2 L.Ed.2d 49, 78 S.Ct. 22, and found in 97 A.L.R.2d, page 1216. This was a disbarment proceedings in which one of the commissioners should have disqualified himself because of interest, since he was a partner in a law firm that represented several members of a railroad association which had financed and directed the prosecution of the charges against the accused. Citing *New Jersey State Board of Optometry* v. *Nemitz*, 21 N.J. Super. 18, 90 A.2d 740, *supra*, § 3(B).

There are numerous cases holding that the pecuniary interest was found too remote to be disqualifying. A writ of mandamus was sought in *Ex parte State Bar Association*, paragraph 1890, 92 Ala. 113, 8 So. 768, 12 L.R.A. 134, to compel a circuit judge to proceed in a disbarment action, where the judge had disqualified himself on the basis that he, as a dues paying member of the incorporated bar association bringing the disbarment action, had a pecuniary interest in the outcome in view of the liability of the bar association for costs of the proceedings should the determination be adverse to the association. Pointing out that the bar association was not a capitalized commercial or financial concern, its members were not stockholders, and its purposes were social, ethical and public, the Supreme Court granted the writ and held that even if the association owned property in which the members would share upon its dissolution, the interest was too remote and speculative to disqualify a member from sitting as a judge or juror in a case to which the bar association was a party. This case supports our contention that the proper remedy

to test the qualification of a judge or board member is by mandamus which has not been done in this case.

Reference is made to *State ex rel. Beddall* v. *Lonctot* (1963), 62 Wash.2d 845, 384 P.2d 877, 97 A.L.R.2d 1201. Under Questions Presented Number 4, we quoted from several cases in the annotation to this *Beddall* v. *Lonctot* case in support of our Question Number 4 and by reference will be adopted in support of our motion to dismiss on the question of pecuniary interest.

The plaintiffs urge that the Lee Optical Company in 1969 sold 75,000 pairs of glasses in Alabama. This is Stipulation 13. The three-judge trial court mentions this in its opinion. It was the opinion of the trial court, with reference to the 75,000 pairs of eyeglasses sold in one year, "presumably if plaintiffs' activities are suspended, defendants would share in this annual business." According to this reasoning, no licensing board could escape the allegation of pecuniary interests, be he an association member or not, on the basis that if the board voted to disbar, revoke or cancel the license of the person charged, then the board members would share in the annual practice or business of the licensed professional charged.

The case of *Eugene T. Ventresca, O.D.* v. *Ohio State Board of Optometry*, No. 71-2, Court of Appeals of Franklin County, Ohio, decided April 13, 1971 (not yet reported), reversed and the injunction dissolved and case dismissed, proves helpful in this matter. The facts are similar in that Dr. Ventresca was sent a notice by the State Board referring to certain allegations against him which would lead to a hearing before the State Board. Dr. Ventresca

promptly filed an injunction suit to enjoin the board from hearing the matter. When the case reached the Ohio Court of Appeals, it had the following to say:

"* * * No one can claim legislation to be unconstitutional until he has been hurt by its operation. In this case, at this point, the plaintiff, Ventresca, has not only not been hurt by the challenged statute, he merely anticipates that he will be. There has been no decision rendered by which he can claim to be hurt since he has, up until now, forestalled a decision. (See such cases as *State, ex rel. Lieux* v. *Village of Westlake* [1951], 154 Ohio St. 412, *Curtiss* v. *City of Cleveland* [1959], 170 Ohio St. 127, *Greenhills Home Owners Corp.* v. *Village of Greenhills* [1966], 5 Ohio St. 2d 207, and others which discuss these concepts.)"

The Court further said:

* * * * * *

"Any decision of the board is subject to appeal under R. C. 119.01 through 119.13. An action in equitable injunction will not operate to forestall a hearing by the board when a resulting decision, if adverse as it would appear the plaintiff anticipates it will be, may be regularly appealed.

"When regulations of the board are questioned, the Supreme Court has made it abundantly clear that it will not aid in making or revising the rules of boards but will only decide whether those rules are reasonable and lawful as applied to the facts of a justiciable case. In *Fortner* v. *Thomas* (1970), 22 Ohio St. 2d 13, the Supreme Court says that it will not consider the lawfulness of an administrative regulation, or a legislative act, in a vacuum, but only when an affected person is involved.

"It is submitted that the equitable procedure here invoked required the trial court to pass upon the law-

fulness of a regulation in a vacuum, that is, before anyone was hurt; in fact, before even the board had acted upon the complaints, 'allegations,' before it.

"The plaintiff is not entitled to an injunction. There is available an adequate remedy at law by way of appeal from any administrative order which affects him adversely.

"The appeal of the appellant board is well taken.

"The judgment of the trial court is reversed and the injunction dissolved.

"Rendering the judgment the trial court should have rendered, the complaint of the plaintiff is dismissed at his costs.

"WHITESIDE and REILLY, JJ., concur."

On the question of harassment, we find, in the case of *Texas State Board of Examiners in Optometry* v. *Carp*, 343 S.W.2d 242, as follows:

"[4] Respondent alleged, among other things, that the members of the Board, who are practicing optometrists, were acting maliciously in furtherance of a conspiracy to harass and annoy him and destroy his practice. He directs our attention to the evidence showing that on one occasion some fourteen of respondent's employees were requested to attend a meeting in Dallas to determine that one member of the Board is a co-owner of respondent's largest competitor, and several of respondent's employees have left him to accept employment with the latter organization. In some instances the discussions which brought this about occurred shortly before or after a meeting of the Board at which the employee in question had been notified to appear. These circumstances do not warrant the conclusion that there is a conspiracy, or that the Board

has made any improper use of its powers, to annoy, harass or damage respondent.

* * * * * *

"[6] If any charge is filed against respondent because of his noncompliance with the Corporate Practice Rule, the ultimate question to be decided is whether he has violated Article 4563(i). Noncompliance with the rule merely makes a prima facie case, and respondent can defeat the complaint by showing that he does not place his license at the disposal or in the service of an unlicensed person. Whether respondent will be able to make that showing is a matter of conjecture, and any injury to him resulting from the Board's interpretation of the rules is equally a matter of conjecture. In the event the Board finds that he has violated the statute, it may but is not required to revoke his license. If his license is revoked, the statute gives him the right of appeal to the district court, and the court may then stay or enjoin the decision of the Board when such action appears to be necessary for the protection of his rights.

* * * * * *

"As pointed out in Turner v. Bennett, Tex.Civ.App., 108 S.W.2d 967, 971 (no writ), 'there is a vast difference in a court reviewing a final order of an administrative board and in prohibiting such board from making any order or from prosecuting an inquiry to ascertain whether any order will be necessary. That courts are without authority to thus interfere with commissions and administrative departments of the government in the lawful exercise of duties and functions committed to them by law is well settled.' See also State Board or Barber Examiners v. Comer, Tex. Civ.App., 109 S.W.2d 1012 (no writ). Various reasons are assigned by the courts as grounds for refusing to grant relief against threatened or pending adminis-

trative action. See 42 Am.Jur. Public Administrative Law, p. 574, § 195 et seq. A board or commission created by the Legislature with authority and responsibility for determining in the first instance whether certain action shall be taken is not subject to restraint by the courts whenever it appears that an erroneous conclusion has been reached on some preliminary or procedural question. Any other rule would afford an opportunity for constant delays in the course of administrative proceedings, and there is no real need for equitable relief in the ordinary case until a final administrative determination has been made.

"The temporary injunction issued in this case prevents the Board from exercising in certain instances the powers vested in it by statute. Proceedings under Article 4563 are begun by filing charges in writing and under oath, and the charges may be made by any person. Article 4556 gives the Board power to issue subpoenas, administer oaths, take testimony, and institute actions in its own name to enjoin the violation of any provision of the Act. If a complaint is presented charging that a licensee has been guilty of any misconduct constituting grounds of revocation, the Board is authorized by Article 4563 to accept and file the same, issue notices, conduct a hearing, and determine the charges upon their merits. In performing these functions, it must hear evidence, ascertain the facts, interpret the statutes and its own rules, apply the same to the facts, and determine whether to cancel, revoke or suspend the license of the person charged. No contention is made that these statutes are invalid, and it is our opinion that the Board is entitled to and should exercise the powers which they confer and discharge its lawful responsibilities without interference from a court of equity.

"The judgments of the courts below are reversed and the temporary injunction is dissolved."

The case of *Dr. Hugh S. Geiger Jr.* v. *Dr. B. H. Jenkins, President of the State Board of Medical Examiners of Georgia, et al.*, 316 F.Supp. 370, involved charges filed before the State Board of Medical Examiners. The procedures for handling such charges and a hearing before the Board are the same or identical to those of Section 206 under attack in this case. The Georgia Optometry Law, Sec. 84-1110, is as follows:

"84-1110. Refusal and revocation of certificates of registration; grounds; hearing; appeal.—The Board of Examiners in Optometry shall refuse to issue its certificate of registration and may revoke its certificate of registration issued to any person who is not of good moral character, or who commits an act involving moral turpitude, or who is guilty of highly unprofessional conduct, or whose certificate was issued through error, fraud, or perjury: Provided, that in all such cases the board shall serve written notice of the charges on such accused person at least 10 days prior to the date set for hearing, and said person shall be notified to appear before the board to answer the charges on such accused person at least 10 days prior to the date set for hearing, and said person shall be notified to appear before the board to answer the charges at such time and place as the board may direct. Such notice shall plainly set forth the charges made, and notify the accused person to appear to answer the same. On such hearing, if the charges are found true, the accused having the right to produce witnesses in his behalf and cross-examine those testifying against him, the board shall render judgment after such hearing, and the person accused may enter an appeal to the next superior court of the county in which the hearing is held, if he is dissatisfied with the

finding, such appeal to be governed by the law relating to appeals in other cases.

"(Acts 1933, pp. 202, 203.)"

Section 206 of the Alabama Optometry Law is shown on pages 3, 4 of our brief and in full as Appenrix A, pp. A1-A2. An examination of Section 206, dealing with the handling of charges, and those described in *Geiger* will show them to be virtually the same in every respect.

In the *Geiger* case, *supra*, the three-judge trial court held the pending charges to be penal in nature and subject to the prohibition of the Federal Anti-Injunction statute, 28 U.S.C.A. 2283, just as interference with state criminal proceedings were prohibited, and dismissed the case since the charges before the Board were pending at the time the Federal Injunction suit was filed. We feel this case to be of such importance in passing on the plea of the State Board to reverse the trial court herein and dismiss this case, we quote as follows from the *Geiger* case, *supra* (later upheld by this Honorable Court as we will show).

"This action for damages and for declaratory and injunctive relief is brought under 28 U.S.C. § 1343 for claims allegedly arising under 42 U.S.C. §§ 1983, 1985, and 1988. An injunction against the enforcement of the state statute which regulates revocation of licenses to practice medicine (Ga.Code Ann. § 84-916) is sought on the ground that the statute is unconstitutional on its face, and a three-judge court has been convened pursuant to 28 U.S.C. § 2281.

"Plaintiff is a medical doctor who has been licensed to practice medicine in the State of Georgia since shortly after his graduation from Emory University

Medical School in June 1950, and who has practiced in this State continuously since June 1, 1956. Defendants are members of the State Board of Medical Examiners of Georgia, certain named employees of that board, certain named members of the East Point Police Department, an investigator for the District Attorney of Fulton County, and certain private individuals who allegedly acted in concert with the named state officials.

"The record shows that on February 18, 1970, the Board of Medical Examiners issued to plaintiff a notice that the Board had been presented with charges that plaintiff had engaged in conduct which might constitute grounds for suspension or revocation of his license to practice medicine. The charges were based on affidavits which were attached to the notice. In general, plaintiff was charged with having solicited, committed, or otherwise participated in acts of sodomy, unlawful sales of dangerous drugs, use of stolen credit cards, theft by receiving stolen property, and various other unlawful acts. The notice stated that a hearing on these charges would be held on March 11, 1970, and plaintiff was informed of his right to controvert the charges, to raise any defenses he wished, to be represented by counsel at the hearing, to respond and present evidence on any relevant issue, and to subpoena witnesses and documentary evidence through the State Board of Medical Examiners. On March 10, 1970, plaintiff filed the instant suit and on May 11th a hearing was held before the three-judge court, after which the parties were allowed additional time within which to file briefs.

"The gist of his attack upon the statute appears to be that it is vague and overly broad on its face and that it gives to the Board of Medical Examiners unfettered discretion to suspend or revoke licenses to practice

medicine. For the reasons set forth below we do not reach the merits of plaintiff's contentions with respect to the statute and the complaint will be dismissed on other grounds.

"[1, 2] First, since state proceedings were pending in the state courts and before the Medical Board at the time plaintiff came into federal court, and since it is those proceedings with which plaintiff asks this Court to interfere, the anti-injunction statute, 28 U.S.C. § 2283,[1] precludes the granting of either declaratory or injunctive relief. *See* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); Brooks v. Briley, 274 F.Supp. 538 (N.D. Tenn. 1967), aff'd. per curiam, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647 (1968).[2]

"Federal courts must look to the law of the State to determine whether proceedings which were pending when suit was brought were judicial in nature. Hill v. Martin, 296 U.S. 393, 56 S.Ct. 278, 80 L.Ed. 293 (1935). Under Georgia law the statute which regulates revocation of licenses to practice medicine is a penal statute and the revocation proceedings themselves are in the nature of criminal proceedings. *See* Hughes v. State Board of Medical Examiners, 158 Ga. 602, 123 S.E. 879 (1924); State Board of Medical Examiners v. Lewis, 149 Ga. 716, 717, 102 S.E. 24 (1920). It follows, therefore, that since license revocation proceedings already had begun, when the instant suit was filed, federal court interference with those proceedings is prohibited by the anti-injunction statute, just as interference with the state criminal proceedings is prohibited.[3]

"[4, 5] Here, as in Reetz, the plaintiff has challenged a state statute regulating activities in which the State has a vital interest. The right to practice medicine is a conditional right which is subordinate to the state's power and duty to safeguard the public health, and it

is the universal rule that in the performance of such duty and in the exercise of such power, the state may regulate and control the practice of medicine and those who engage therein, subject only to the limitation that the measures adopted must be reasonable, necessary, and appropriate to accomplish the legislature's valid objective of protecting the health and welfare of its inhabitants. *See* McNaughton v. Johnson, 242 U.S. 344, 37 S.Ct. 178, 61 L.Ed. 352 (1917); Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); 41 Am. Jur., Physicians and Surgeons, §§ 3-8. It is beyond dispute that the power of the State to regulate the practice of medicine includes the power to create an administrative board and vest in it the supervision of such regulation. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

"[7] Equally without merit are plaintiff's claims that he has been denied due process and equal protection of the laws because charges which might well result in the loss of his license to practice medicine have been placed against him and because affidavits by 'known perjurers and narcotic addicts' formed the basis for these charges. To the contrary, the record shows that plaintiff has been afforded notice and an opportunity to be heard on the charges which have been made—a hearing which he seeks to prevent—and at this point it clearly cannot be said that he has been denied due process.

"Accordingly, the complaint is dismissed for failure to state a claim upon which relief can be granted."

[Footnotes omitted.]

This Honorable Court affirmed the dismissal of the *Geiger* case as follows:

"No. 5952. HUGH S. GEIGER, Jr., Appellant, v B. H. JENKINS, President of State Board of Medical Examiners of Georgia, et al.

"401 US 985, 28 L Ed 2d 525, 91 S Ct. 1236.

"March 29, 1971. Appeal from the United States District Court for the Northern District of Georgia. The judgment is affirmed. Younger v Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct. 746; and Samuels v. Mackell and Fernandez v Mackell, 401 US 66, 27 L Ed 2d 688, 91 S Ct 764.

"Same case below, 316 F Supp 370."

In the case of *State* v. *Keel*, Ala., 35 So.2d 625, *supra*, it clearly appears that Alabama has declared that charges such as pending before the Alabama State Board are criminal offenses just as did the Georgia courts hold that charges pending before the State Board under the statute which regulates revocation of licenses to practice medicine to be penal statutes and the revocation proceedings themselves are in the nature of criminal proceedings. *Geiger, supra.*

We now are confronted with the situation where the Georgia three-judge court dismissed the case filed in *Geiger, supra,* under quite similar revocation procedures to that in Alabama, because charges were filed before the federal injunction suit; and in *Geiger* the trial court, and later this Honorable Court, by affirming the *Geiger* case, held that such charges and revocation proceedings before the Board were penal in nature and the anti-injunction statute, *supra,* prohibited interference with such proceedings. But in the Alabama case the three-judge trial court held exactly the opposite, even though the Alabama courts held such proceedings criminal in nature, and not only

granted an injunction but passed on the merits of the case as well. All this in the face of the Motion to Dismiss by the State Board and other defenses raised by the pleadings.

Now this Alabama *Gibson* case is before this Honorable Court for decision. It is also of significance to note that this Honorable Court has denied certiorari in the appeal of the *Henry* case, *supra*, in which the 5th Circuit Court reversed the lower trial court and directed a dismissal of the case and return to the state court for further proceedings.

It is urged that the trial court appears to have based its opinion on its conclusion that charges preferred against a licensed professional in Alabama to be heard by the licensing board are administrative in nature and the anti-injunction statute (28 U.S.C.A. 2283) does not apply and its opinion rendered herein clearly so indicates this erroneous conclusion.

On the question of Board members being members of the association filing the charges as grounds for disqualification, we find in *Michon* v. *Louisiana State Board of Optometry Examiners*, 121 So.2d 567, the following:

> "[1] The first assignment of error contends plaintiff did not receive a fair hearing before the Board which conducted the hearing. His position is that Drs. Hewitt and Roberts should have recused themselves from any participation in the hearing. The only reason advanced for this argument is that both of these members of the Board were also members of the Southwest Louisiana Optometric Society, which organization was responsible for the charges filed against him. It was stipulated in the record that neither Dr. Hewitt nor Dr. Roberts

was present at the meeting of the Society when action was taken directing that the charges be filed. Notwithstanding this fact, it is argued without supporting evidence, that these members of the Society were aware of the charges and for this reason alone they were disqualified to sit in judgment upon the rights of plaintiff. A careful examination of the record fails to reveal any indication that either of the Board members possessed any preconceived resolution of the charges against appellant. Furthermore, it was not essential that such charges be filed by a professional society, but they may be presented to the Board by an individual. An additional reason plaintiff cannot claim prejudice on this score is that the charges so made and considered by the Board may be reviewed by the courts, as is being done in this instance. The defense so made is without merit."

There has just been decided by this Honorable Court the case of *Robert Mitchum Book Mart* v. *Clinton E. Foster, Prosecuting Attorney of Bay County, Florida, et al.* (June 19, 1972, reported in full in 40 L.Wk. 4737, 315 F.Supp. 1387), which appellants feel is persuasive in the case at bar in favor of the appellants. We believe that charges to revoke one's license, as here, comes under the anti-injunction statute, 28 U.S.C. 2283, and precludes the granting of injunctive relief as held by the three-judge trial court in *Geiger, supra*, and this Honorable Court affirmed the judgment of the trial court in *Geiger, supra* (401 U.S. 985).

From the above cited cases we urge it is abundantly clear that the plaintiffs herein should pursue their remedy on the remaining charges either by a hearing before the State Board or some appropriate action in the state courts of Alabama and that in this case, the order of the trial

court granting an injunction and hearing the case on its merits should be reversed and the case dismissed at the cost of the plaintiffs.

The Order on Pre-Trial Hearing is shown as Appendix K, p. A43.

The Notice of Appeal to the Supreme Court of the United States is shown as Appendix L, p. A47.

CONCLUSION

It is submitted that the decision of the three-judge district court is not supported by law and the facts in this case as shown by decisions of this Court, other federal courts and state courts. The State Board urges this Honorable Court to reverse the order of the trial court granting an injunction herein and direct a dismissal of this case so the remaining issues involved can be tried in an orderly manner under the laws of Alabama.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ___ day of August, 1972, I served three copies of the foregoing brief, on all parties required to be served, by depositing copies of such brief in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
   P. O. Box 116
   Montgomery, Alabama 36101

2. On Honorable Douglas E. Bergman
   Mercantile Bank Building
   Dallas, Texas 75201

Richard A. Billups, Jr.

APPENDIX A

[CODE OF ALABAMA]

* * * * * *

§ 206. (2889) License may be suspended or revoked.—A license issued to any person may be suspended for a definite period of time, or revoked by the state board of optometry for any of the following reasons; to-wit: Conviction of any offense involving moral turpitude, in which case, the record of conviction, or a certified copy thereof certified by the clerk of the court or by the judge in which court the conviction is had, shall be conclusive evidence of such conviction. For unprofessional conduct. "Unprofessional conduct" shall be defined to mean any conduct of a character likely to deceive or defraud the public, lending his license by any licensed optometrist to any person, the employment of "cappers", or "steerers" to obtain business, "splitting" or dividing a fee with any person or persons, the obtaining of any fee or compensation by fraud or misrepresentation, employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work, by use of any advertising, carrying the advertising of articles not connected with the profession, the employment of any drugs or medicines in his practice unless authorized to do so by the laws covering the practice of medicine of this state, or the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice. When a license or certificate has been obtained by fraud practiced on the board. When the holder of a license or certificate is suffering from a contagious or infectious disease. Gross incompetency. Intemperance in the use of intoxicating liquors or narcotics to such an extent as unfits the holder of the license for the proper practice of optometry. Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same, and a copy of the charges, which must be made in writing, and verified by oath, together with a notice of the time and

place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be effected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the person or persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of licenses as herein provided for, the holder may appeal to the circuit court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked resides. (Ib.)

APPENDIX B

[Old Section 210 Before Repeal]

§ 210. (2893) Store where glasses are sold; how department conducted.—Nothing in this chapter shall be so construed as to prevent any person, firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such a store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation. (Ib.)

[Old Section 211 Before Amendment]

§ 211. (4387) False or misleading statements in advertisements or stores having optometry departments.—It shall be unlawful for any person, firm or corporation, engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. And it shall be unlawful for any individual, firm or corporation, engaged in the sale of goods, wares or merchandise who maintains or operates, or who allows to be maintained and operated in connection with said mercantile business an optometry department; or who rents or subleases to any person or persons for the purpose of engaging in the practice of optometry therein, any portion of or space in said store, premises or establishment in which such person, firm or corporation is engaged in said mercantile business, to publish, or circulate, or print or cause to be printed, by any means whatsoever, any advertisement or notice of the optometry department maintained, operated, or conducted in said establishment or place of business, in which said advertisement or notice appear any untruthful, improbable, impossible, or misleading statement or statements, or anything calculated to mislead or deceive the public. (1919, p. 742; 1935, p. 896.)

* * * * * *

After Amendment

§210: Repealed by Acts 1965, p. 324, §1, appvd. Aug. 4, 1965

[§211 as amended]

§211. (4387) False or misleading statements in advertisements or circulars.—It shall be unlawful for any person engaged in the practice of optometry in this state to print

or cause to be printed, or circulate or cause to be circulated, or published, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. (1919, p. 742; 1935, p. 896; 1965, p. 304, § 2, appvd. Aug. 4, 1965.)

APPENDIX C

TO THE ALABAMA STATE BOARD OF OPTOMETRY
IN RE: DR. J. HARRY SPARKS

I, the undersigned, as President of the Alabama Optometric Association, allege and charge that Dr. J. Harry Sparks a registered optometrist in Alabama, is practicing in violation of the Alabama Optometry Law since August 4, 1965 when Governor George Wallace signed House Bill No. 205, at 11:59 A.M. which House Bill No. 205, among other things, repeals Section 210 of the Alabama Optometry Law as found in title Chapter 11, Sections 190 to 213 inclusive, 1940 Code of Alabama, in that he is operating through a company or corporation, to-wit: Lee Optical Company of Alabama, Inc., and is aiding, abetting and assisting said corporation to unlawfully practice optometry in Alabama by offering to make eye examinations and fit glasses and is receiving pay and financial emolument in return for so aiding, abetting, assisting and making it possible for said corporation to so unlawfully practice optometry in Birmingham (Ensley), Alabama. See exhibits 1, 2, 3 and 4 attached.

I further allege and charge that Dr. J. Harry Sparks is practicing optometry under a false or assumed name to-wit: Lee Optical Company of Alabama, Inc., in violation of Section 191 of the Alabama Optometry Law.

I further allege and charge that Dr. J. Harry Sparks is soliciting the sale of eyeglasses in violation of Section 203 of the Alabama Optometry Law through the advertising campaign as presently conducted on behalf of himself and Lee Optical Company of Alabama, Inc.

I further allege and charge that Dr. J. Harry Sparks is guilty of unprofessional conduct as defined by law in Section 206 of the Alabama Optometry Law in that he is lending his license to Lee Optical Company of Alabama, Inc., and is employing the Lee Optical Company of Alabama, Inc. as cappers and steerers to obtain business and further that Dr. J. Harry Sparks is splitting or dividing his fee with Lee Optical Company of Alabama, Inc.

I further allege and charge that Dr. J. Harry Sparks received knowledge of the repeal of Section 210 of the Optometry Law by the passage of House Bill No. 205 shortly after August 4, 1965 by a letter from the Alabama Optometric Association and a letter from the Alabama State Board of Optometry, by certified mail, which they sent Dr. J Harry Sparks advising of the repeal of Section 210 and enclosing a copy of House Bill No. 205 as signed by the Governor and urging his compliance with the Optometry Law as amended.

That because of his willful, continued and unlawful acts and conduct in thus aiding and abetting and assisting a corporation to-wit: Lee Optical Company of Alabama, Inc., to unlawfully practice optometry in Alabama without right to do so and because of the unlawful acts and unprofessional conduct as set out above the said Dr. J. Harry Sparks should have his license to practice optometry in the State of Alabama revoked after due notice and hearing before the State Board of Optometry which hearing is respectfully requested.

Dated this 23rd day of October, 1965

s/ Roy C. Adams
ROY C. ADAMS, O.D.

[APPENDIX]

STATE OF ALABAMA
MONTGOMERY COUNTY

Before the undersigned, notary public, in and for said County and State personally appeared Dr. Roy C. Adams, President, Alabama Optometry Association, who after being duly sworn, deposed and said that the allegations contained in the foregoing charges are true and correct and acknowledged that he signed the charges voluntarily this the 23 day of Oct., 1965.

s/ Thomas F. Parker
NOTARY PUBLIC

EXHIBIT NO. 1

Act No. 218

Be it enacted by the Legislature of Alabama:

Section 1. Code of Alabama (1940), Title 46, Section 210, is hereby expressly repealed.

Section 2. Code of Alabama (1940), Title 46, Section 211, is hereby amended to read as follows:

Section 211:

"It shall be unlawful for any person engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public."

Section 3. This act shall become effective immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

EXHIBIT NO. 2

STATE BOARD OF OPTOMETRY

Dear Fellow Optometrists:

Enclosed you will find a copy of House Bill #205 which was passed by the House and Senate. This bill was signed by Governor George Wallace Wednesday, August 4, 1965, 11:59 A. M.

Your Board of Examiners wants you to know the general guidelines that it has adopted so that you might govern your actions relative to the changes to the Alabama Optometry Law as now amended by House Bill #205.

We have adopted a conciliatory rather than a militant approach in urging all optometrists to comply with the Alabama Optometry Law as now amended.

The Alabama Optometric Association in an effort to offer every assistance in the transition from present working conditions to establishing your own private practice has developed a plan that will be made available to those that desire help. You will very shortly receive a copy of this plan.

[APPENDIX]

Your State Board of Examiners is presently considering adoption of new rules and regulations as authorized under the optometry Law and by the courts and in doing this they are considering some of the worth while rules and regulations that have been adopted, and approved by the courts, by some of our Sister States. In due course these will be announced.

It is the sincere desire of the State Board of Examiners that every Optometrist promptly comply with the Alabama Optometry Law as now amended because the failure to do so will of necessity result in action having to be taken.

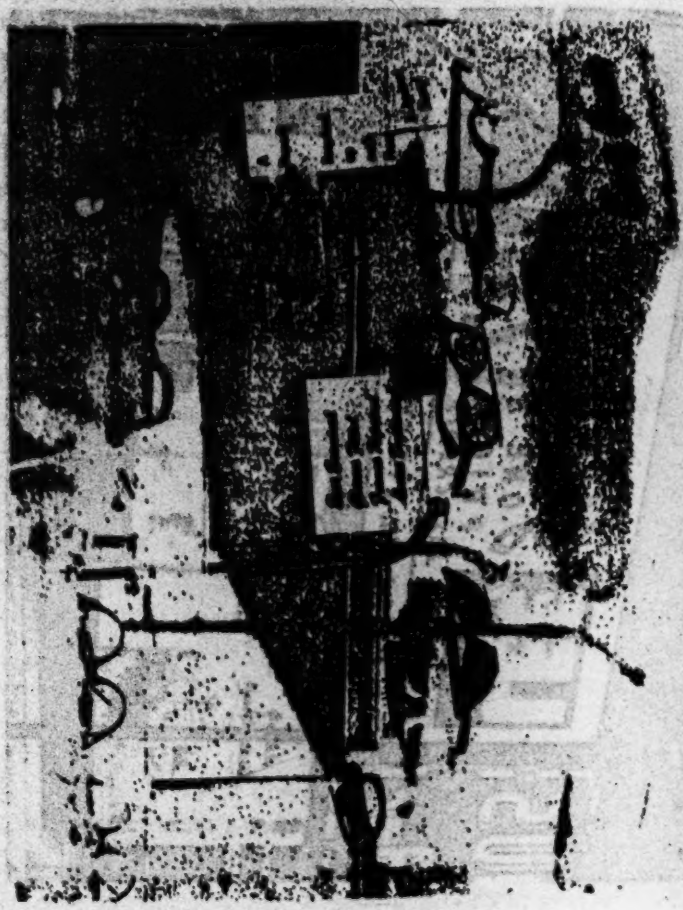
Sincerely,

s/ Willard Smith
Secretary Board of Examiners

EXHIBIT NO. 3

[APPENDIX]

EXHIBIT NO. 4



APPENDIX D

AFFIDAVIT

I, Dr. Roy C. Adams, Optometrist, Monroeville, Alabama, after first being sworn under oath state as follows:

I am a registered optometrist in Alabama and have practiced my profession at Monroeville, Alabama for a number of years. I am and have been since I started to practice a member in good standing of the Alabama Optometric Association.

I was elected president of the Alabama Optometric Association in 1964 and served in various official capacities in the Association prior to that time.

Upon the repeal of Section 210 of the Optometry law in 1965, the Association wrote a letter to all optometrists advising of this and offered their help to all employed optometrists in optical departments in establishing their own independent professional practice any place they chose in Alabama. No one accepted our help and continued to operate as they had prior to the repeal of Section 210.

After several weeks had passed the Alabama Optometric Association decided to start investigating and gathering evidence to show how these employed optometrists and their employers were not complying with the optometry law as amended. This was done by and at the expense of the Association, its officers and attorneys. The State Board of Optometry took no part in this whatsoever.

After our investigation and evidence gathered showed Lee Optical Company and its employed optometrists to be doing the same as before and what appeared to be in flagrant violation of the amended optometry law, we instructed our attorneys to prepare an injunction suit against Lee Optical Company, as well as others so engaged, and their employed optometrists and also to prepare charges

against the employed optometrists setting forth their violation of applicable sections of the optometry law and when this was done, and upon advice of counsel, I signed the charges on October 23, 1965, and they were transmitted to the State Board of Optometry for such action they felt should be taken. At no time did I as president of the Alabama Optometric Association try to dictate what action it should take.

Our attorneys felt the evidence justified the filing of an injunction suit against Lee Optical Company and their employed optometrists—so one was prepared and presented to the State Board of Optometry for their consideration and it was later filed. At no time did I as president of the Alabama Optometric Association try to dictate to the Board that they had to file such an injunction suit or did any one else to my knowledge. The suit was filed voluntarily by the State Board.

Dated this the 2nd day of June, 1971.

s/ Roy C. Adams, O.D.
ROY C. ADAMS, OD

Sworn and subscribed before me the undersigned authority, this the 2nd day of June, 1971.

s/ Bruce H. Hood
NOTARY PUBLIC

APPENDIX E

STATE BOARD OF OPTOMETRY, Complainant	)	IN THE CIRCUIT COURT
VS.	)	MONTGOMERY COUNTY, ALABAMA
LEE OPTICAL COMPANY OF ALABAMA, INC., a corporation, Respondent	)	IN EQUITY CASE NO. 36705

DECREE

This is an action by The State Board of Optometry (hereinafter sometimes referred to as "the Board") seeking to enjoin Lee Optical Company of Alabama, Inc., a corporation, (hereinafter sometimes referred to as "Lee") from the unlawful practice of optometry, either directly or indirectly in the State of Alabama . . . from employing by any means or arrangement registered optometrists or physicians, surgeons or oculist to examine the eyes of its customers and prescribe eyeglasses for their 'Lee Optical' stores or any other stores owned by it anywhere in the State of Alabama . . ." The Bill of Complaint also prayed for process and for general relief. Originally thirteen licensed optometrists and one physician were included as Respondents, but they have been eliminated as parties by a previous order of this Court.

The questions of whether the Board has authority to maintain this action and whether injunction is the proper remedy have been settled by the Supreme Court of Alabama in a previous appeal in this case. *State Board of Optometry* vs. *Lee Optical Company of Alabama, Inc.*, 284 Ala. 562; 226 So. 2d 623.

[APPENDIX]

This cause was submitted for final decree upon the pleadings as amended and testimony taken ore tenus and both parties have filed briefs. Subsequent to submission, Respondent filed a Motion To Set Aside Submission. Upon consideration of the pleadings as amended and the testimony, the Court makes and enters the following finding of facts:

FINDING OF FACTS

1. That the Board was legally and duly created and constituted and is presently functioning pursuant to Chapter 11, 1940 Code of Alabama, as amended, and is authorized to hold examinations and grant licenses to practice optometry in Alabama; and that at the time this action was filed Dr. Thomas S. Gibson, Huntsville, Alabama, was President; Dr. Willard Smith, Eufaula, Alabama, was Secretary, and that together with Dr. James L. Cash, Selma, Alabama; Dr. George W. Posey, Jasper, Alabama, and Dr. George R. Carlton, Alexander City, Alabama, they constituted the duly appointed and qualified members of the State Board of Optometry.

2. That Lee is an Alabama corporation; that it operates some fourteen stores for the sale of eyeglasses throughout Alabama under the trade name of "Lee Optical", one of which is located at 6 Dexter Avenue, Montgomery, Alabama; and that it also operates other stores for the sale of eyeglasses in Alabama under other trade names.

3. That at the time this action was filed and at all times from then until April 1, 1970, it was the policy and practice of Lee to employ under written contracts of employment and on a salary basis, licensed optometrists and physicians, and that insofar as it was possible to do so, Lee did employ such optometrists and physicians to work for it in its respective "Lee Optical" stores and other stores in Alabama to examine the eyes of and to prescribe glasses for its customers; that under such contracts of employment, the

optometrists and the physicians employed by Lee were under the control of Lee and a supervisor employed by Lee; that the contracts of employment of such optometrists and physicians were terminable by Lee without any notice; that the records maintained by such optometrist and physician employees on patients or customers became and were the property of and under the direction and control of Lee; that under the terms of said contracts of employment the optometrist and physician employees of Lee were specifically required to refrain from any action deleterious or harmful to Lee; that such contracts of employment provided for fringe benefits, including two weeks paid vacation; a profit sharing and pension retirement plan; and group hospitalization and life insurance.

4. That the 1965 Legislature of Alabama through Act No. 218, which was signed by the Governor on August 4, 1965, repealed Section 210 and amended Section 211 of Title 46, Code of Alabama (hereinafter sometimes referred to as "Section 210" and "Section 211" respectively).

5. That subsequent to the repeal of Section 210, the Secretary of the Board notified all optometrists in Alabama, including the optometrist employees of Lee, of the repeal of Section 210.

6. That at the time Section 210 was repealed and for some period of time subsequent thereto, Lee conducted an advertising program under Lee's respective trade names wherein the phrases "Eyes Examined" and "Glasses Fitted" were used; wherein it was sometimes stated that one price included among other things "Your Scientific Examination"; and whereby, generally, the public was led to believe that Lee was qualified to practice optometry; that in some such advertising the names of the optometrist employees of Lee were used, and in some advertising such names were not used; that this advertising program was generally similar for all stores operated by Lee in Alabama; and that at some time subsequent to the repeal of Section 210 and prior

to the trial of this cause, the advertising program of Lee was altered, but to an immaterial extent.

7. That at the time this suit was filed and at all times from then until April 1, 1970, the operation of its stores in Alabama by Lee was essentially the same; that when a prospective purchaser entered a store, he was ushered by a Lee employee into the office or space occupied by the optometrist employee serving that store; that such optometrist employee made a minimal examination of the eyes of said customer and wrote a prescription for glasses; that no fees were charged by the optometrist employees for such examination; that then Lee, through its servants, agents and employees, including the optometrist employees, immediately attempted to make a sale of eyeglasses to the customer; that all patient's and other records were kept and maintained by and were under the direction and control of Lee; that all money involved in the transaction was handled by Lee; that by the very nature of the employment contracts involved, the primary concern of the optometrist employees of Lee was the sale of eye-glasses rather than the welfare of the customers; that prescriptions were written and the sale of glasses were made using documents which bore the name of "Lee Optical"; that as a result of the arrangement between Lee and its optometrist employees and Lee's advertising program, the public was misled and deceived into believing that Lee was and is qualified to make eye examinations; and that Lee, through its optometrist employees, was making eye examinations and prescribing glasses as well as selling them.

8. That on April 1, 1970, (which was approximately five years after the repeal of Section 210 and shortly prior to the trial of this cause) Lee cancelled its written employment contracts with the optometrist employees serving its stores and entered into a "Lease" agreement whereby it purported to lease space in its respective stores to the optometrist employees serving such stores; that the change of status of the optometrist from that of "Employee" to

"Lessee" was accomplished primarily by telephone; that none of the optometrist employees objected to this change in status; that by such change in status, the optometrist employees gave up the fringe benefits contained in their previous contract of employment; that subsequent to the change of status of the optometrists serving Lee stores from that of "Employees" to that of "Lessee" on April 1, 1970, the only visible difference in the operation of the stores of Lee from the operation of such stores prior to April 1, 1970, was that there was added to Lee's sales documents a charge for eye examinations; that under the lease arrangement, Lee furnishes space "together with adequate and sufficient opthalmic equipment necessary and required . . ." for the optometrists to examine eyes at Lee's stores; that although separate fees are itemized for eye examinations, Lee collects for the eye examination at the time glasses are sold or are paid for and remits to the optometrists on a semi-monthly basis, all such fees collected; that said lease arrangements contained provisions whereby the "lease" can be cancelled upon 10 days notice.

9. That the modern accepted minimum eye examination taught in optometry schools and practiced by the profession consists of essentially five parts:

(1) Case History; (2) Examination of the Outer Eye; (3) Examination of the Inner Eye With an Opthalmoscope; (4) A Refraction; and (5) a Glaucoma Test; that depending upon the assistance available to the optometrist, such a minimum examination takes at least 20 to 30 minutes; that the optometrist employees and lessees of Lee did not and do not conduct such a minimum examination; that basically those optometrists perform only the refraction; that the refraction is the step in the examination that may result in a prescription for eyeglasses; that the average time required for a customer to enter one of Lee's stores, be ushered into the office of the optometrist employee (or lessee), have an examination; and be sold a pair of glasses is 7 to 10 minutes.

OPINION

The Court is convinced that the overriding question in this case is the effect of the repeal of Section 210 and the amendment of Section 211 in August, 1965. Prior to this legislative action, the employment of a duly licensed optometrist by a corporation (or a person or firm) was clearly authorized by the statutory law of Alabama and upheld by the courts. *Alabama State Board of Optometry* vs. *Busch Jewelry Company*, 261 Ala. 479, 75 So.2d 121; *Busch Jewelry Company* vs. *City of Bessemer*, 269 Ala. 180, 112 So. 2d 344; and *McCrory* vs. *Wood*, 227 Ala. 426, 171 So. 2d 242.

Optometry is one of the emerging professions in the health care field. The weight of modern authority is in favor of the legal consideration of optometry as a profession as distinguished from a trade or business (88 ALR 2d 1290 etc.) In a Mississippi case (*Sears Roebuck* vs. *State Board of Optometry*, 213 Miss. 710, 57 So. 2d 726); the court stated:

> "The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which have arisen in modern times by reason of the necessity for specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine."

The Alabama Supreme Court in *Hampton* vs. *Brackin's Jewelry and Optical Company*, 237 Ala. 212; 186 So. 173, followed the weight of authority in categorizing the practice of optometry as a profession when it said:

> "It cannot be doubted for a moment that the practice of optometry bears a direct and substantial relation to the public health, and that it calls for special skill and knowledge on the part of those practicing it. It was for this reason, no doubt, that the Legislature undertook to legislate upon the subject, that the public might be

protected from fakers and incompetence. We know from common experience that there are many distressing troubles which are attributable to defective eyesight, and which may be cured, or relieved, by properly fitted glasses."

The court further added:

"The Legislature recognizes the fact that no one, without the requisite skill and knowledge, should be allowed to practice optometry . . ."

The court then further said:

"Thus it would appear that the Legislature has seen proper to recognize and regard optometry as a profession, one requiring knowledge of the functioning of the eye, its anatomy, and of pathology as applied to optometry.

"When the optometrist undertakes to make an examination of the eye, with a view of determining whether glasses will be of aid to his patient, he must, of course, bring to bear, in making such examination this professional, or scientific skill, and knowledge, and he can not be directed by his employer, who has no such knowledge. He acts, and must act, *in* such matters, as his skill and knowledge and independent judgment suggest is the proper course to be pursued."

In spite of the Supreme Court's recognition of optometry as a profession in *Hampton*, it was bound by the statutory law of this state. Prior to the reepal of Section 210 the Court held in three separate cases that neither by Board regulation, city ordinance or ethical code could an attack on corporate practice of optometry be sustained so long as Section 210 was in effect. *Busch Jewelry et al.* vs. *Alabama State Board of Optometry*, supra, *Busch Jewelry* vs. *City of Bessemer*, supra and *McCrory* vs. *Wood*, supra.

Prior to August 4, 1965, Sections 210 and 211, expressed a legislative intent contrary to the law of a majority of the states and contrary to modern philosophy by expressly authorizing the commercialization of the practice of optometry in allowing "any person, firm or corporation" to practice optometry through the employment of a duly licensed optometrist.

This court is convinced that the repeal of Section 210 and the amendment of Section 211 was a recognition by the Alabama Legislature that this state was out of step with the rest of the nation in dealing with the profession of optometry, and that it was not in the best interest of Alabama citizens to maintain the statutory distinction between the practice of optometry and the other professions in the health care field.

This action by the Legislature taken in the light of the two *Busch* cases and the *McCrory* case seems to declare a public policy against the corporate practice of optometry, whether it be direct or by indirection. It must be assumed that the Legislature, in repealing Section 210 and amending Section 211 took into consideration the following statement by the Alabama Supreme Court in *Busch Jewelry et al.* vs. *Alabama State Board of Optometry:*

> "If there is to be a change in the Legislative policy therein expressed, (Sections 210 and 211) that is a matter for legislative action."

The general rule regarding the corporation practice of optometry is:

> "It is generally held that in the absence of express statutory authority, a corporation may not engage in the practice of optometry either directly or indirectly through the employment of a duly registered optometrist." *13 Am Jur*, Corporations, Section 837.

The Court feels that this role holds twice true when such "express statutory authority" is repealed by the Legislature, in the face of court decisions expressly construing the statute to allow such practices.

In 1969 the Alabama Legislature took another giant step forward by granting further prominence to the profession of optometry through the establishment of a School of Optometry at the University of Alabama in Birmingham.

In light of the action of the Alabama Legislature as described and the status of the profession of optometry in other states, this court is not impressed with the efforts of Respondent at the trial to degrade the profession of optometry. An optometrist, like a dentist, or a physician, has a relationship with his patients that cannot be nurtured in the market place. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. If an optometrist is the employee of an optical concern whose main interest is the sale of optical goods, such relationship tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient. Surely an optometrist should be absolutely independent of everything and everybody except his profession and the people who confidentially depend upon him to aid them in improving and preserving their sight.

The Court is, however, impressed with the efforts of the State Board of Optometry and individual practitioners to improve and upgrade the profession of optometry. Apparently the Alabam Legislature has joined in this movement. This Court can do no less.

The Court holds that the action of the Alabama Legislature in repealing Section 210 and amending Section 211, terminated the right that Lee had to conduct an optical dispensing business with the aid and assistance of an optometrist employee. There is no longer in Alabama statutory

authority for a person, firm or corporation to operate a business wherein eyes are examined and glasses are fitted even with a licensed optometrist on the premises, and the Court holds that it is unlawful for Lee to do so or to advertise to the effect that it is qualified to do so.

Notwithstanding the repeal of Section 210, Lee continued to operate its stores throughout Alabama with the assistance of employed optometrist until April 1, 1970.

The circumstances surrounding the change of the modi operandi of Lee on April 1, 1970, convinces the Court that this action was simply a subterfuge engaged in between Lee and its former employees to continue their former unlawful arrangement through a sham lease arrangement.

The ease with which Lee was able to convert its employment contracts with its optometrists into leases; the lack of objection on the part of the optometrist employees to giving up fringe benefits; the similarity in the operation of the stores before and after the change; the continuation of the minimal eye examination by the optometrists, and the retention by Lee or the right to terminate the "Leases" on short notice, indicate a continuing control by Lee over its optometrists that is not commensurate with the freedom necessary for a professional person to concern himself primarily with the best interests of his patients. The fact that Lee continued to operate under its employment contracts for nearly five years after the repeal of Section 210 and until shortly prior to the trial of this cause does not speak well of its good intentions.

There are many cases in other states where corporations unlawfully engaging in the practice of optometry through employees attempted to circumvent the law with "lease" arrangements. In the Ohio case, *Rowe* vs. *Standard Drug Company*, 132 Ohio St. 629, 9 N.E. 2d 609, wherein an employment arrangement was changed to a lease arrangement the court stated that it was not limited to the terms of the lease, but would consider the manner in which the

optical business was conducted and the extent to which the corporation participated in transactions involving optometrists. That Court said:

> "Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The Courts will always pierce the veil to discover the real relationship. Where a corporation directly or indirectly engages in the practice of optometry the lease will afford no protection on a proper challenge of the illegality."

In years gone by there are many reported cases which show that the professions of medicine and law had to resort to courts of equity to enjoin and stop commercialists who would debase those professions for personal profit with little or no regard for the welfare of the public. In more recent times, the profession of dentistry had to follow that same trail. The profession of optometry is now involved in a similar battle. This Court has no alternative under the law but to assist this effort.

It is therefore CONSIDERED, ORDERED, ADJUDGED and DECREED as follows:

1. That the Motion To Set Aside Submission heretofore filed by Respondent be, and the same is hereby denied.

2. That Lee Optical Company of Alabama, Inc., be and it is hereby enjoined, restrained and prohibited from engaging in the practice of the profession of optometry, either directly or indirectly, and from employing, by any means, whether directly or indirectly, licensed optometrists or physicians to examine the eyes of its customers and prescribe eyeglasses for them.

3. That Lee Optical Company of Alabama, Inc., be, and it is hereby further enjoined, restrained and prohibited from keeping optometrists, whether by contract of employ-

ment, by lease agreement or device, in its places of business in Alabama for the purpose of examining the eyes of and prescribing eyeglasses for its customers.

4. That Lee Optical Company of Alabama, Inc., be and it is hereby further enjoined, restrained and prohibited from showing on its store fronts or in any other advertising elsewhere by whatever means, the name of any optometrist or physician and from using in any such advertising phrases "Eyes Examined," "Glasses Fitted," "Your Scientific Eye Examination," and from using in any such advertising, any other words, phrases or expressions which will in any way indicate to the public that it is qualified to or will examine eyes or fit glasses or which would tend to indicate to the public that Lee will or is qualified to examine the eyes of its customers or fit eyeglasses for them in connection with the sale of its eyeglasses.

5. That Lee Optical Company of Alabama, Inc., be and it is hereby further enjoined, restrained and prohibited from making any arrangement with any optometrist or physician whereby it would refer its customers to such optometrist or physician or whereby such optometrist or physician would refer their patients to Lee, for the specific purpose of promoting the sale of Lee's eyeglasses, regardless of where such optometrist or physician is located.

6. That Lee Optical Company of Alabama, Inc., be and it is hereby further enjoined, restrained and prohibited making referrals of customers to any specific eye specialist or indicating the possible convenience of a nearby eye specialist.

7. That this decree be and the same is hereby made applicable to all officers, agents, servants and employees of Lee Optical Company of Alabama, Inc.

8. That it is not the intention of this Court through this decree, and the same will not be construed, to enjoin Lee Optical Company of Alabama, Inc., from pursuing the

trade or business of a dispensing optician, so long as it does so in a lawful manner and so long as it does not attempt to unlawfully practice optometry through its agents, servants or employees, or through any other arrangement, either directly or indirectly, anywhere in the State of Alabama in any establishment owned or controlled by or in any manner connected with it.

9. That, this decree constituting a prohibitory injunction and not coming within the provisions of Title 7, Section 793-795, Alabama Code, the Respondent will not be allow to supersede this decree pending any appeal herefrom. (Stricken by Amendment and Supersedeas granted.)

10. That the Respondent, Lee Optical Company of Alabama, Inc., be and it is hereby taxed with the costs herein accrued for which let execution issue.

Done this 17 day of March, 1971

/s/ RICHARD EMMET
CIRCUIT JUDGE IN
EQUITY SITTING

Alton L. Turner
Luverne, Alabama

Thomas F. Parker
10 High Street Building
Montgomery, Alabama

Richard A. Billups, Jr.
P. O. Box 1056
Jackson, Mississippi

ATTORNEYS FOR
COMPLAINANT

Douglass E. Bergman,
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Dallas, Texas 75201

HILL, HILL, STOVALL,
CARTER & FRANCO
Harry Cole
P. O. Box 116
Montgomery, Alabama 36101

Attorneys for Respondent
Lee Optical Company of
Alabama, Inc., A
Corporation

APPENDIX F

STATE BOARD OF OPTOMETRY COMPLAINANT	)	CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF
VS.	)	ALABAMA
HOUSE OF $8.50 EYE-GLASSES INC. a corporation, et al RESPONDENTS	)	EQUITY DIVISION
	)	CASE NO. 159-616

FINAL DECREE

This cause was originally filed and several preliminary pleadings were filed and determined in the Bessemer Division of this Court. Later, the cause was transferred to this division. An extended oral hearing was held in this division to the merits of the cause before another judge who took the matter under submission under a note of testimony filed in Open Court on July 14, 1970. On July 6, 1971, the cause was refiled and resubmitted to the undersigned judge. As to the validity and propriety of the rulings upon pleadings anterior to this instant Final Decree, this Court will consider itself bound, and particularly, because there has been no re-presentation or objection thereto by counsel for the several parties.

This cause presents a justifiable controversy properly filed and heard and determined in a Court of Equity. The prayers of the Bill of Complaint as finally amended are, essentially, as follows: First, that the Respondent Corporation as it acts through its departments and agents in the employment of registered optometrists, physicians, surgeons or oculists to examine the eyes of its customers and prescribe eyeglasses is an unauthorized and unlawful practice of the profession of optometry as defined in the statutes and the case law applicable thereto in the State of Alabama; and, second for a prohibitory injunction against all

Respondents in the cause from any unlawful practice of optometry, either directly or indirectly in the State of Alabama and the corporate Respondent particularly from employing by any means or arrangement registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses therefor anywhere in the State of Alabama; and third, for general relief.

The Court has been furnished with briefs by counsel and has carefully reviewed the multitude of cases in this jurisdiction and throughout the United States relative to the issues posed by the pleadings in this cause, and particularly the statutes which treat the profession of optometry.

There would be no particular virtue in a recitation of the evidence and any findings of fact by the Court, except that the Court does find, that as hereinafter set forth, Complainant, State Board of Optometry, is, substantially, entitled to the specific reliefs prayed.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

ONE: That House of $8.50 Eyeglasses, Inc., a corporation is hereby enjoined from, either directly or indirectly, employing by any means or arrangement registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses therefor anywhere in the State of Alabama.

TWO: All individual Respondents are hereby enjoined from any unlawful practice of optometry, either directly or indirectly, in the State of Alabama.

THREE: That the House of $8.50 Eyeglasses, Inc., a corporation in its employment through its departments and agents of registered optometrists, physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses for them is an unauthorized and unlawful

practice of the profession of optometry as defined in the laws and statutes of the State of Alabama.

FOUR: The Respondent, House of $8.50 Eyeglasses, Inc., is hereby taxed with the costs of this action, for which let execution issue.

DONE and ORDERED this the 8th day of July, 1971.

/s/ Wm. P. Barber
CIRCUIT JUDGE IN EQUITY SITTING

cc: Hon. Thomas F. Parker
Hon. Richard A. Billups, Jr.
Hon. Lee Baines
Hon. William G. West

APPENDIX C

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APPENDIX H

AFFIDAVIT

I, Dr. James L. Cash, Optometrist, 12 Broad Street, Selma, Alabama, after first being duly sworn under oath states as follows:

I am a registered optometrist in Alabama and I have practiced my profession in Selma, Alabama, for over twenty (20) years. I am, and have been since I started to practice, a member in good standing of the Alabama Optometric Association.

I was appointed to serve as a member of the Alabama State Board of Optometry in 1956 and served continuously until early 1971 when my successor was appointed upon the expiration of my then current term. I have served as long if not longer on the Alabama State Board than any other optometrist.

It is an unwritten understanding when a member of the Alabama Optometric Association is appointed to the State Board that he will no longer take an active part in Association activities or accept an office of officer in the Association because many years ago and prior to 1955 it became clear, and we were so advised by legal counsel, that the members of the State Board, in addition to conduction examinations of new licenses, we would be called upon to hear and decide any charges against an optometrist that might be filed and therefore should take no part in or advise any one with reference to any such charges because it was the duty of the Board members to refrain from reaching a decision on any such matter until it was heard by the Board, as provided in the Alabama Optometry Law, after which the Board members would then decide the matter.

About the same time the Association members were made aware of the responsibilities of the State Board members and that they, individually or an an association, would have to assume the responsibility of making investigations that might lead to the filing of charges against an optometrist and if any such were to result in charges it would be up to the Association members or officers to prepare, document, and file them with the State Board. It then became the Board's decision as to further action, if any, to be taken by the Board, including the scheduling of a hearing as provided in the Alabama Optometry Law.

At no time since the charges were filed with the Board against the optometrists then employed by Lee Optical Company in 1965 has the Alabama Optometric Association or any member thereof, tried to dictate or even suggest to the State Board how these charges would be handled or action to be taken by the Board on them.

I was president of the State Board during most of the last two years. I served on the State Board and sat through the trial of the Lee case before Judge Emmet as representative of the State Board. With reference to the Lee suit and others filed by the State Board, all of the investigation, taking of pictures, affidavits of prospective witnesses and all acts taken in the investigation of Lee and other companies with reference to their compliance with the Alabama Optometry Law, after the repeal of Section 210 thereof, was conducted by the Alabama Optometric Association and its officers and at its expense, a bill of complaint against Lee Optical, together with exhibits attached, was then presented to the State Board for heir consideration in filing it. The Board decided it should be filed and this was done without the Board reaching a conclusion as to the merits of the charges.

The State Board decided it would be helpful in hearing and reaching a decision on the charges filed against the

individual optometrists to wait until one of the lawsuits was tried since any such court decision would serve as a guide for the Board. The individual optometrists were then notified of and furnished a copy of the charges, and told they would be advised later of the time and place for a hearing as provided by the Optometry Law.

Shortly prior to the trial in State court of the Lee case, the charges against the optometrists employed by Lee were scheduled for hearing and upon being assured by their counsel in a letter to our attorney that the Board members would not be challenged for cause for participating in the trial, the hearings were continued. No Board member took or was called to the witness stand in the Lee trial. After the Lee case was decided by Judge Emmet these charges were again scheduled for hearing and upon the filing of the suit in Federal Court our counsel readily agreed to voluntarily continue them again to await a decision on the motion for a temporary restraining order and on the motion to dismiss filed by the defendants.

Dated this the 2nd day of June, 1971

s/ James L. Cash, OD
JAMES L. CASH, OD

Sworn and subscribed before me the undersigned authority, this 2nd day of June, 1971.

s/ Joyce Robinson
NOTARY PUBLIC

APPENDIX I

ALABAMA STATE BOARD OF OPTOMETRY

Office of the Secretary
P. O. Box 286
Eufaula, Alabama, 36027

July 8, 1971

To ALL ALABAMA OPTOMETRISTS:

Your attention is invited to the enclosed Regulation #1 of 1971 recently adopted by the State Board of Optometry. This is for your information.

Sincerely yours,

s/ Willard Smith
Secretary

ALABAMA STATE BOARD OF OPTOMETRY

Office of the Secretary
P. O. Box 286
Eufaula, Alabama 36027

MINUTES OF THE STATE BOARD OF OPTOMETRY

Regulation No. 1—1971

Pursuant to Section 194, Title 46 of the Alabama Optometry law, it is made the duty of the Alabama State Board of Optometry to make regulations as provided therein and pursuant thereto the State Board of Optometry in session duly assembled, on this 13th day of June, 1971, in the City of Montgomery, Alabama, there being a quorum present and participating duly adopted the following regulation to be known as Regulation No. 1, 1971:

Since Section 206, Title 46 of the Alabama Optometry law provides for an appeal in cases of suspension or revocation of a license holder, after a hearing before the Board as provided in said Section 206, the holder may appeal to the Circuit Court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked or suspended resides but failing to specify the procedure by which any such appeal will be accomplished, the Board adopts the following with reference to any such appeal:

When a license holder desires to appeal from any holding or decision made by the State Board in a case against him, he shall within 10 days from the date such decision is announced by the Board file in writing with the Secretary of the Board notice of his intention to appeal. He shall have thereafter 30 days in which to prepare a transcript of the proceedings against him including any testimonies for filing with the Circuit Court in the county of his residence and if the reporter is unable to prepare the transcript within this time he shall make application to the president of the Board for additional time, in a reasonable amount, and said extension shall be approved. Thereafter when the transcript is so filed the appeal will be perfected to await the decision of the Circuit Court. Any appeal from the decision of the Circuit Court will be made to the Appellate Court of Alabama in the manner now provided by law for the appeal of equity cases. From the time the decision of the State Board of Optometry is announced and while an appeal is pending in the courts awaiting a final decision, the execution of any revocation of license or suspension thereof will be stayed and no action to enforce same will be taken by the State Board of Optometry. If at any time an appeal is abandoned or not pursued as provided herein and by law the Board will then be free to give 10 days notice to the license holder of such abandonment of his appeal and if said appeal is not reinstated or perfected as provided by

law the Board can then take such action as it deems necessary to carry out the decision it had formerly announced following the hearing before it. Also if the decision of the Board is finally affirmed on appeal the Board will then notify by registered mail, return receipt requested, the license holder of its action to be taken to enforce its decision and give him 30 days within which to comply therewith.

The Board took up the further matter of the Bill of Complaint for an injunction having been signed and verified by Dr. Thomas Gibson, then President of the State Board of Optometry and presently a member thereof, and concluded that if an optometrist who was a named defendant in any such suit and against whom charges were pending before the Board to revoke his license challenged Dr. Gibson for cause to sit as a member of the Board hearing charges against him, the Board now feels it would be proper for it to sustain such challenge and Dr. Gibson would be excused and the charges heard by the remaining Board members, not challenged for cause and excused so long as a quorum remained was present so the Board could function as such, would proceed to a hearing on the charges as provided in Section 206, Title 46 of the Alabama Optometry Law.

Certified as a true copy—

/s/ E. E. Ashbee
E. E. Ashbee, OD
President of the Board

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, et al. Plaintiffs	)	
	)	CIVIL ACTION
Vs.	)	NO. 3339-N
	)	
THOMAS S. GIBSON, et al, Defendants	)	

STIPULATION

It is stipulated by and between the parties as follows:

1. Paragraphs 2, 3 (a), 3 (c), 4, 5 and 6 are admitted by all of the parties, both plaintiff and defendant.

2. At the time notice of the August 1970 hearings were given plaintiffs demanded that the respondent State Board of Optometry recuse itself, a copy of the demand being attached hereto as Exhibit 1. Subsequently the August hearing was postponed by mutual agreement of the plaintiffs and defendant State Board with the stipulation that neither party's position would be altered by so doing. This agreement is set out as Exhibit 2.

3. Plaintiff optometrists are all licensed, practicing optometrists in the State of Alabama. In October of 1965 when the original charges were preferred against them, they were all employees of Lee Optical Company of Alabama, Inc., a corporation. Lee Optical Company of Alabama, Inc. is a corporation engaged in the business of optical dispensing. It sells eyeglasses at an advertised price. Prior to October 1965 Lee advertised eyeglasses, advertised that it *conducted* or *furnished* eye examinations by a registered optometrist on its premises. Exhibit 3 depicts

advertisements and photographs of Lee's premises showing the advertising conducted upon its premises. The optometrist employed in the Lee stores were employed on a salary. No charge was made for eye examinations except instances where the patient did not need eyeglasses. In those instances a nominal charge was made for the examination which went into Lee's receipts with the optometrist getting no part of it. A copy of the employment contract in use between Lee and its optometrists at the time of the filing of the charges against the Lee optometrists is attached hereto as Exhibit 4 with deposition testimony of Dr. William B. McCrory who identified the employment contract.

4. In October of 1965 Lee modified its advertising program by taking out of any advertisements any references to optometrical examinations or optometric services. Its ads were directed toward the advertisement of eyeglasses. A copy of the ad in use which is typical of those used since October 1965 is attached hereto as Exhibit 5. The store windows of Lee Optical do not contain any reference to an optometrist or that an optometrical examination is available inside the store.

5. In April 1970 Lee entered into a new agreement with its optometrists, a copy of which is attached hereto as Exhibit 6. This agreement in substance allowed the optometrist to lease the optometrical office and equipment from Lee, to occupy the space therein for the purpose of conducting eye examinations and to set his fee. Arrangements were made whereby the Lee clerical help collects the fees which are charged, posts them on a balance sheet and Lee remits the fees to the optometrist. There is no other pecuniary arrangements between the optometrist and Lee. All pension plans, withholding tax arrangements, group insurance plans and other employee benefits which had been available to the optometrists through Lee were discontinued as of April of 1970.

Under the present arrangements the optometrist conducts examinations in the leased premises within the Lee Optical dispensary. He does not pay any rent. The consideration to Lee is the availability of an optometrist to examine eyes of patients who come in without prescriptions for glasses. Lee receives no part of the fee for the optometric examination and the optometrist receives nothing from Lee by way of remuneration because of the sale of a pair of eyeglasses. The additional examination fee is now paid by the customer who comes in.

The optometrists in the Lee Optical stores do not advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

6. Defendants Gibson, Ashbee, Carlton, Warr and Smith, members of the State Board of Optometry of the State of Alabama are also members of the Alabama Optometric Association. Dr. Thomas S. Gibson was a member of the Legislative Committee of the State Association in 1965 and also a member of the Board of Optometry. As President of the Board of Optometry he signed the complaint in a civil suit, the complaint in which is attached as Exhibit 7 by which he made affidavit as to the truth of certain charges against plaintiffs. Board members at the time of the filing of the complaint against plaintiffs were defendants Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Willard Smith and James L. Cash.

7. The Alabama Optometric Association consists of approximately 100 members. The dues paid by each member are $240 per year; of this $140 goes to the American Optical Association. These dues are used to finance the Association's activities and also to defray legal expenses of investigating and initiating charges against plaintiffs in this action. The Alabama Optomeric Association has for several years been interested in eliminating "corporate practice" which the plaintiffs are alleged to be engaged in

by being employed by Lee Optical Company or by practicing on its premises. In 1965 the Alabama Optometric Association was active in securing the repeal of Section 210 of Title 47 of the Optometry Code of the State of Alabama. This was the section which allowed and required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Defendants Gibson, Carlton, Smith, Ashbee and Warr contributed to a legislative fund raised by the Alabama Optometric Association to promote the repeal of these sections, the repeal of which allegedly makes the practice of plaintiffs illegal.

8. The State Board of Optometry has no rules or regulations concerning the practice of optometry within the State of Alabama. The charges pertaining to the plaintiffs in this instance involve an alleged violation of the State Code regulating the practice of optometry as it presently exists.

9. It is stipulated by and between the parties that Section 210 of Title 47 was repealed August 4, 1965, that charges were initiated by the Alabama Optometric Association against plaintiffs and filed with the State Board October 23, 1965, a copy of the said charges made against each optometrist being the same as Exhibit 8 hereto made against Dr. Harry Sparks, that civil suit was filed by the State Board against plaintiffs and Lee Optical on October 25, 1965, a copy of the complaint and exhibits thereto being attached as Exhibit 7.

10. Attached to the original of this stipulation are depositions of Dr. William B. McCrory and members of the State Board of Optometry taken May 21 and 22, 1970 and it is stipulated that the parties would so testify in this action.

11. It is further stipulated by and between the parties that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

12. It is further stipulated that each of the plaintiffs, if called to testify, would testify that Lee Optical Company of Alabama, Inc. had never interferred with his professional practice, called upon him to alter his judgment and that his professional judgment was in no way affected or impaired, nor was his allegiance to his patients impaired or affected by reason of the fact that he practiced on the premises of a dispensing optician.

13. Mr. Gene Shanbaum of Dallas, Texas, Secretary of Lee Optical Company, testified in the trial of *State Board* v. *Lee* in the Circuit Court of Montgomery County that he had checked the records of Lee Optical and that in 1969 Lee sold 75,000 pairs of glasses in Alabama.

14. The Alabama Legislature created the School of Optometry in 1968 to be located in the Medical Complex of the University of Alabama at Birmingham and it is now in its second year of teaching optometry students.

15. Drs. Pillion and Sparks, who had formerly been employees of Lee and now practice as lessees on Lee's premises, testified in the *State Board* v. *Lee* trial that they made more money as lessees of Lee under their present arrangement than they had as a salaried employee for Lee.

16. Dr. Milton E. Warr was appointed to the State Board of Optometry on or about January 1, 1971 and prior to that time had no contact with the charges against the plaintiffs or the suit against Lee Optical Company.

17. The employment agreement which Lee had with its optometrists prior to April of 1970 and the lease arrangement presently in use both contain a 10 day cancellation clause.

18. If called to testify Dr. George R. Carlton, a member of the State Board, will testify that by-laws of the Association provide that the Association recommend names to the Governor for appointment to membership on the State Board. The Association in years past has made this

recommendation, but has rarely been followed by the Governor. In recent years no recommendation has been made. None of the present Board members were recommended by the Association for appointment. There is no provision in the optometry law which allows the Association to nominate Board members.

19. There is no provision in the optometry laws or elsewhere for the appointment of a new Board if the present Board is enjoined from hearing pending charges.

20. The House of $8.50 Eyeglasses has now been decided by the Circuit Court in Birmingham and is in the process of being appealed; a copy of the Circuit Court decree is attached as Exhibit 9.

21. Section 210 of the optometry law was repealed on August 4, 1965. There was no change in the signs and advertising done in all the Lee stores until after the charges here involved were filed on October 23, 1965 and the suit filed against Lee and its optometrists several days later.

22. The State Board of Optometry adopted Resolution No. 1 on June 13, 1971; a copy of the Resolution being attached hereto as Exhibit 10.

23. All exhibits attached to pleadings, briefs or other documents heretofore filed with the court are admitted as to genuineness and what they purport to be for the convenience of the court; however, by admission of documents or this stipulation, neither of the parties admit the relevance thereof as to the issues.

s/ Douglas E. Bergman
Douglas E. Bergman

s/ Harry Cole
Harry Cole

Attorneys for Plaintiffs

s/ J. G. L. Marston III

s/ Donald G. Valeska II
Deputy Assistant
Attorneys General

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.

Attorney for Defendants

APPENDIX K

IN THE UNITED STATE DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

L. M. BERRYHILL, ET AL,
Plaintiffs,
VS
THOMAS S. GIBSON, ET AL,
Defendants.

FILED
JUL 30, 1971
JAMES P. GARDEN, Clerk
By ..... Deputy Clerk

CIVIL ACTION NO. 3339-N

ORDER ON PRE-TRIAL HEARING

This cause coming on to be heard on a regular pre-trial hearing and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed: the complaint and amendment thereto; Defendants' motion to dismiss; and Defendants' answer.

2. It was agreed by all parties that the Defendants' motion to dismiss should be continued and consolidated with other issues for a hearing by the three judges empaneled to hear this cause, and further proceedings on said motion are hereby ORDERED continued. It is further ORDERED that the first and second causes of action be, and the same are hereby, consolidated with the motion to dismiss for trial and that this cause is set for trial in the United States District Court, Second Floor Courtroom, Federal Building, Montgomery, Alabama, on the 16th day of August, 1971, at 10:00 o'clock A.M., on the issues of fact and law presented by the complaint, the amended com-

plaint, the motion for preliminary injunction, the motion and amended motion to dismiss, and the Defendants' answer.

3. It was agreed by all the parties that the case would be submitted on written stipulations or depositions on or before August 16, 1971, and it is the ORDER of this Court that all discovery be completed on or before August 10, 1971, and that the parties file with the Court briefs covering the law of the case on or before August 13, 1971.

4. It was agreed by all of the parties that the following are all of the issues in controversy in this cause: that Plaintiffs claim to be optometrists who will be harassed, irreparably damaged, and illegally and unconstitutionally deprived of their rights to pursue their profession if this Court does not enjoin Defendants, members of the State Board of Optometrists of the State of Alabama, from prosecuting proceedings in that body to revoke Plaintiffs' licenses and to deprive the Plaintiffs of their right to practice optometry in the State of Alabama. They claim that the procedure by which the Board is given authority to regulate their practice is violative of their rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution for the following reasons:

A. The charges against Plaintiffs before the State Board are alleged to be too vague to sufficiently apprise the Plaintiffs of the charges against them.

B. The Board is charged with being prejudiced and biased against the Plaintiffs because of the Board members' prior activities in proceeding against the Plaintiffs and because of a pecuniary interest in excluding the Plaintiffs from practicing optometry.

C. It is charged that the law and rules of the Board improperly and unconstitutionally discriminate against the Plaintiffs as a state law provides that the Gov-

ernor shall appoint, from the membership of the Association, the Board of Optometry which governs practice of optometry within the state and a by-law of the Optometrists' Association prohibits employed optometrists from membership in the Association. Plaintiffs contend they are thereby deprived of an opportunity to participate in the government of their own profession.

D. It is charged that the law providing for suspension of licenses of the Plaintiffs is unconstitutional as it provides for suspension by the Board with no provision for supersedeas on appeal to a court for review of suspension of the license.

5. Plaintiffs withdraw the charge in their complaint that the Board is estopped from prosecuting its suspension of license proceeding against Plaintiffs because it has annually renewed their licenses to practice, and the Plaintiffs withdraw, without prejudice, their claim for damages.

6. The Defendants, by motion, deny federal jurisdiction and, by answer, set up the following defenses:

A. They deny that charges against the Plaintiffs in the State Administrative proceedings are imprecise, and the parties agree that the charges against the Plaintiffs in the said state proceedings involve no charges of breach of ethics but are concerned only with the Plaintiffs' having violated laws.

B. Defendants deny that the hearing lacks due process of law.

C. Defendants insist, by virtue of Regulation 1, 1971, adopted by the Board, providing for supersedeas and recusal of Board members who have interests in the proceedings, that due process will be accorded Plaintiffs on hearing in the Administrative proceedings.

D. They admit that a by-law of the Association prohibits optometrists who are employed by any company from being members of the Association, and they admit that the law provides that only members of the Association may be appointed to the Board. They further admit that the Board does control the practice of optometry in the State of Alabama.

It is, therefore, ORDERED by the Court that all of the above-named allowances and agreements be, and the same are hereby, binding upon all parties in the above-styled cause, unless this order be hereafter modified by order of this Court.

DONE this 30th day of July, 1971.

s/ R. E. Varner
United States District Judge

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, RICHARD T. WOOD, WILLIAM B. McCRORY, FRANKLIN H. PEARCE, B. J. FITZSIMMONS, WILLIAM BAYA, JR., JAMES J. COUCH, JAMES A. MILLER, HOWARD W. SMITH, J. HARRY SPARKS, O. L. WILSON, ROBERT M. HOWARD and JOHN H. PILLION,
PLAINTIFFS

VS.

CIVIL ACTION
NO. 3339-N

THOMAS S. GIBSON, E. E. ASHBEE, GEORGE R. CARLTON, MILTON E. WARR, and WILLARD SMITH, Individually and as members of the State Board of Optometry of the State of Alabama; STATE BOARD OF OPTOMETRY OF THE STATE OF ALABAMA, ALABAMA OPTOMETRIC SSOCIATION an unincorporated association, J. E. THOMPSON, President of Alabama Optometric Association, and ROY C. ADAMS,
DEFENDANTS

[Return Receipt shows filed on Sept. 22, 1971]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr, and Willard Smith, Individually and as members of the State Board of Optometry of the State of Alabama; State Board of Optometry of the State of Alabama, Alabama Optometric

Association, an unincorporated association, J. E. Thompson, President of Alabama Optometric Association, and Roy C. Adams, the Defendants above named, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on September 3, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

s/ Richard A. Billups, Jr.
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PROOF OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Defendants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st of September, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on all parties required to be served, by depositing a copy of such Notice of Appeal in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
   Hill Building
   Montgomery, Alabama
2. Honorable Douglas E. Bergman
   Mercantile Bank Building
   Dallas, Texas 75201

s/ Richard A. Billups, Jr.
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APPENDIX

Appendix

Stipulation upon which District Court in part based its Order and Opinion A-1

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 653

THOMAS S. GIBSON, ET AL.,

APPELLANTS,

v.

L. M. BERRYHILL, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1253.

DECISION OF THE DISTRICT COURT

Upon written stipulation of the parties (R. 195), the three-judge District Court enjoined the scheduled hearings before the State Board of Optometry, holding that the application of Section 206 Title 46, Code of Alabama, as to the Appellees, violated the Appellees' rights to due process because the Appellants were biased or prejudiced and had a pecuniary interest in the outcome of the proceedings.

QUESTION PRESENTED

Whether the District Court was prohibited by 28 U. S. C. §2283 from enjoining the Appellants from conducting administrative hearings to revoke Ap-

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pellees' licenses, where Appellees alleged the violation of due process rights and rights secured under 42 U. S. C. § 1983 and where evidence showed bias on the part of the Appellants so that Appellees would suffer irreparable injury in absence of injunctive relief.

STATEMENT

PROCEDURAL HISTORY

This is a direct appeal from the final order and judgment (R. 577) entered by a three-judge District Court convened pursuant to 28 U. S. C. §§ 2281, 2284. (R. 158)

This action, as amended (R. 111 and Order on Pre-Trial Hearing paragraph 4, R. 174) arises under Article IV, Section II and the 5th, 6th and 14th amendments to the Constitution of the United States and specifically 42 U. S. C. § 1983. Jurisdiction is conferred by Title 28, Sections 1331 and 1343 (3).

This action was brought by Appellees, Plaintiffs below, (hereinafter referred to as "Plaintiffs") who are optometrists duly licensed to practice in Alabama who were employed by a corporation, against the Appellants, Defendants below, (hereinafter referred to as "Defendants" and sometimes referred to as the "State Board of Optometry" or the "Board") members of the State Board of Optometry who are in private practice, asking the District Court to enjoin Defendants from conducting a hearing on charges theretofore preferred (R. 195, Exhibits 7, 8, 8A and 8B to Stipulation) against the Plaintiffs and from revoking or suspending the licenses of Plaintiffs to practice optometry in Alabama. Plaintiffs alleged in their complaint that the Defendants members of the State Board of Optometry,

were biased and had exhibited prejudice toward the Plaintiffs so that the Defendants could not conduct, as to these Plaintiffs, a fair, impartial hearing and that therefore, the Plaintiffs would be deprived of their right to engage in their chosen profession and earn a livelihood without being afforded due process of law as guaranteed by the Constitution of the United States. (R. 111)

FACTS

Upon the written stipulation of the parties (R. 195), depositions of the Defendants (R. 195), Plaintiffs and other exhibits as noted, the three-judge District Court enjoined the Defendants, members of the State Board of Optometry, from holding hearings to revoke Plaintiffs' licenses to practice optometry, holding that Title 46, Section 206, Code of Alabama, was unconstitutionally applied as to Plaintiffs in that it deprived them of due process rights guaranteed by the Constitution of the United States. (R. 577) The holding was based upon a finding of bias and prejudice on the part of the Defendants, which, when coupled with the authority conferred upon them by the said statute, operated to deprive Plaintiffs of their constitutional rights. The stipulated facts and exhibits thereto (R. 195) show a long history of litigation between one faction, the Alabama Optometric Association which dominated and controlled the State Board of Optometry and which described themselves as "private practitioners", and Plaintiffs who were described as "commercial practitioners", or employees of a corporation. (R. 195, Stipulation; deposition of Dr. Thomas S. Gibson, pp. 17-21, 30, 51, 53, 56-57; deposition of Dr. George W. Posey, pp. 5, 7, 8, 39-40, 50-51, 54-55; deposition of Dr. Willard Smith, pp. 13, 18, 21-23, 49-50; deposition

of Dr. George Carlton, pp. 13-14; deposition of Dr. E. Ashbee, pp. 49-51; deposition of Dr. James Cash, pp. 4, 14) Defendants, practicing under their own names, are engaged in the sale and dispensing of glasses and optical goods and the general practice of optometry. Plaintiffs, employees of Lee Optical Company at the inception of the litigation were employed as optometrists. Plaintiffs, however, were not engaged in the sale of eye glasses, in that their remuneration bore no relation to sales of optical goods. Their employer, Lee Optical, is engaged in the sale and dispensing of optical goods. (R. 195, Stipulation, paragraphs 3-5, 7)

The Alabama optometry laws, Title 46, Section 190, et seq., govern the practice of optometry in the state. Sections 192 and 206 are pertinent in that they pertain to the appointment and authority of the State Board of Optometry. Section 192 provides that the members of the State Board of Optometry (hereinafter sometimes referred to as the "Board") shall be members in good standing of the Alabama Optometric Association, Inc. (R. 161, paragraph 12 of Defendants Answer to Complaint and Counterclaim; R. 174 Pretrial Order, paragraph 6D) The Board is then given the authority to conduct disciplinary hearings and revoke licenses of practitioners for stated offenses.

The Defendants testified that they followed the dictates of the Alabama Optometric Association and that they contributed to common legal funds and in effect that the Association governed the practice of optometry. The only function the Board performed on its own was to examine applicants for licenses. The Alabama Optometric Association had been interested in the elimination of "corporate practice" for years and

some of the Defendants had chaired legislative committees or had been officers in the Alabama Optometric Association when this was sought to be accomplished. (R. 195, Stipulation, paragraph 7, deposition of Dr. Thomas S. Gibson, pp. 51, 53, 56-57; deposition of Dr. Willard Smith, pp. 20-23, 49-50; deposition of Dr. E. E. Ashbee, pp. 49-51; deposition of Dr. James L. Cash, p. 14; deposition of Dr. George R. Carlton, pp. 13-14)

The rules and by-laws of the Alabama Optometric Association prohibit membership of any optometrist who is employed by a corporation, thereby precluding Plaintiffs' membership in the profession's governing body. (R. 74, Order on Pretrial Hearing, paragraph 6D) Initially, the State Board of Optometry, at the behest of the Alabama Optometric Association, (hereinafter sometimes referred to as the "Association") attempted to impose provisions of the Association's Code of Ethics upon non-association optometrists. The recipient of this action was William B. McCrory, one of the Plaintiffs below. (R. 161, Answer to Second Cause of Action, p. 5, paragraph 13) In *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241 (1965) the Supreme Court of Alabama held that although the Legislature could constitutionally delegate the regulation of a profession to a professional association the professional association, however, could not impose its code of ethics or private rules upon non-member practitioners.

In 1965 the Alabama Optometric Association began a campaign to have certain legislation enacted which later became the basis for the actions culminating in this appeal. It is established by stipulation and the depositions attached thereto, that members of the Alabama State Board of Optometry had, in conjunction

with the Alabama Optometric Association, established a fund to procure the passage of such legislation as would eliminate "corporate practice" in the State of Alabama, thereby leaving the private practitioners as the only practicing optometrists and the only outlet for the sale and dispensing of optical goods. (R. 195, Stipulation, paragraphs 3-7) The size of the fund is unknown, however, it seems established that most of the members of the Alabama Optometric Association, including the Defendants, contributed $500.00. (R. 195; deposition of Dr. Gibson, p. 56-57; deposition of Dr. George R. Carlton, pp. 13-14) These funds were brought to Montgomery, Alabama, and given to a lawyer. The amount given to him was, according to one of the Defendants who was the President of the State Board of Optometry, "classified information". (R. 195; deposition of Dr. Thomas Gibson, pp. 56-57) These activities eventually resulted in the repeal of Section 210 of Title 46 of the Code of Alabama. Section 210 granted express authority for optometrists to advertise the sale of optical goods, allowed optical dispensaries to employ optometrists and required optical dispensaries in which eye examinations were conducted to show in their advertisement the name of a registered optometrist under whose supervision such examinations were conducted. (R. 195, Stipulation, paragraph 7)

Subsequent to the repeal of Section 210, the Board brought civil proceedings against Lee Optical Company and Plaintiffs alleging that they were engaged in illegal and unethical practices in that the Plaintiffs were employed by Lee Optical Company as Cappers and Steerers, etc., (R. 195, Stipulation, paragraph 9) and asked that such practice be enjoined. At the same time, individual charges were filed by the Alabama Optometric

Association with the Board against each of the Plaintiffs alleging the same offenses, (R. 195, Exhibits 8, 8A and 8 B attached to the Stipulation) and the Defendants notified the Plaintiffs that such charges would be set for hearing before them.

In subsequent legal proceedings, Plaintiffs were dismissed as parties from the civil suit brought by the State Board of Optometry against Lee Optical Company. This suit proceeded to trial and the Trial Court enjoined Lee Optical Company from employing the Plaintiffs. This decision was reversed and rendered by the Alabama Supreme Court. See *Lee Optical v. State Board of Optometry*, ...Ala....., 261 So. 2d 17. The Alabama Supreme Court held that the employment of optometrists by corporations was not illegal or unethical so that the actions complained of by the State Board of Optometry were not illegal or unethical. During the pendency of the appeal of *Lee Optical v. State Board of Optometry, supra*, the Defendants notified the Plaintiffs that the old charges which had been filed against them in 1965 would be set for hearing.

Plaintiffs had previously asked the Defendants to rescue themselves (R. 195, Stipulation, paragraph 2 and Exhibit No. 1 attached to the Stipulation) because they (a) had made affidavit of the Plaintiffs' guilt in the civil suit, the basis of which was the same as charges to be heard by them in the disciplinary hearings (b) had contributed to funds to finance the litigation attempting to enjoin Plaintiffs from being employed by Lee Optical Company, which employment was the basis of the disciplinary hearings (c) had contributed to a legislative fund and been active in the Alabama Optometric Association, an organization

which sought to eliminate a competing optical practice in which Plaintiffs were engaged. (R. 195, Stipulation, paragraphs 6-7).

Defendants steadfastly refused to recuse themselves from hearing the pending charges which were filed subsequent to the institution of this suit. The Defendants passed "Regulation Number One" which attempted to provide supersedeas for appeal in the event they revoked an optometrists' license. Such a grant, of course, could amount to no more than administrative grace on the part of the Board as the regulation had no statutory force or effect and could be revoked or altered at will as is illustrated by the stage and time of enactment.

When Plaintiffs were given notice that the Defendants intended to try their case on the old charges, the validity of which had been decided by the Alabama Supreme Court in *Lee Optical v. State Board of Optometry, supra*, this action was filed in the District Court because the Plaintiffs' demand that the Board recuse itself had already been denied. Facts necessary to the decision were stipulated. (R. 195) The District Court correctly found that Plaintiffs rights were violated and that irreparable injury would result.

ARGUMENT

Defendants in their "Jurisdictional Statement" and their brief, at pages 16 through 21 of their discussion of "Questions Presented" state that the District Court has held the Alabama optometry statute unconstitutional per se. Defendants are incorrect. While the Alabama Supreme Court in *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241, did hold the statute was prima

cie constitutional, the question of individual Board embers' qualifications to hear specific charges was t presented or considered. A study of *McCrory v. ood, supra,* and the opinion of the District Court, ows no conflict. In *McCrory v. Wood, supra,* the ourt was not confronted with circumstances of any milarity to the factual situation here presented. The ipulated facts in the instant case clearly show bias, rejudice and a lack of impartiality on the part of the efendants, would-be prosecutors, judges and triers f fact. (R. 195, Stipulation, including depositions of efendants, as noted on pp. 3-4 of Appellees' brief)

Defendants at pages 67 through 75 of their brief ise for the first time on this appeal 28 U. S. C. § 2283, he federal anti-injunction statute. It is submitted hat § 2283 presents the legal question before the Court nd that the recent case of *Mitchum v. Foster,* ..... . S....., 32 L. Ed 2d 705, decided June 19, 1972, y the Court clearly establishes that § 2283 does not reclude a three-judge District Court, as in this case, rom enjoining state proceedings where the state pro- eedings are attacked on the grounds that they were eing unconstitutionally applied by the state so as to ause great and irreparable harm. *Mitchum v. Foster, upra,* and this case before the Court are practically lentical. In both cases 42 U. S. C. § 1983 was invoked ecause a state proceeding was unconstitutionally ap- lying a state law, the result of which would deprive he plaintiff of his right to earn a livelihood and there- y cause him irreparable harm. Moreover, in both ases, an injunction was sought under § 1983, which is he "expressly authorized" exception to § 2283. The ourt in *Mitchum v. Foster, supra,* cites and dis- nguishes or overrules all of the pertinent cases cited

by the Defendants in their brief at pages 68 through 75.

Defendants have compounded and confused the basic issue in this action, which is the right of admittedly qualified optometrists to hold specific private employment, and to pursue a chosen profession free from unreasonable interference and unbiased regulation. It is well settled that this right is a property right protected by the Fifth and Fourteenth Amendments to the Constitution of the United States. See *United States v. Robel*, 389 U. S. 258; *Konigiberg v. State Bar of California*, U. S. Annotated 6 L. Ed 2d 1328; *Willner v. Committee of Character and Fitness of the Supreme Court of New York*, 373 U. S. 96 Annotation 2 A. L. R. 3d 1254.

Defendants question the sufficiency of evidence relating to the finding of bias and argue that the case of *Miller v. Aldridge*, 212 Ala. 660, 103 So. 835, is authority for their contention that Plaintiffs should have pursued the state remedy of mandamus to require recusal of biased or prejudiced members of the State Board of Optometry. Plaintiffs submit that *Miller v. Aldridge, supra*, does not preclude the jurisdiction of federal courts to secure constitutionally protected rights of individuals where such rights are threatened. *Ex parte Young*, 209 U. S. 123, *Boddie v. Connecticut*, ...U. S......, 28 L. Ed 2d 113; *Mitchum v. Foster, supra*. In *Mitchum v. Foster, supra*, the Court speaking of the rights of a federal court to enjoin a state proceeding stated:

IV

"§ 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat. 13. It was 'modeled' on § 2 of the

Civil Rights Act of 1866, 14 Stat. 27 and was enacted for the express purpose 'enforcing the provisions of the Fourteenth Amendment.' 17 Stat. 13.

* * *

"As a result of the new structure of the law that emerged in the Post-Civil War era and especially of the Fourteenth Amendment which was its centerpiece, the role of the federal government as a guarantor of basic federal rights against state power was clearly established. Monroe v. Pate 365 U. S. 167, 5 L. Ed 2d 492, 81 Sup. Ct. 473; McNeese v. Board of Education, 373 U. S. 668, 10 L. Ed 2d 622, 83 Sup. Ct. 1433; Shelley v. Kraemer 334 U. S. 1, 92 L. Ed 1161, 68 Sup. Ct. 836, 3 A. L. R. 2d 441; Zwickler v. Koota, 389 U. S. 241, 245-249 19 L. Ed 2d 444, 448-451, 88 Sup. Ct. 391; Flack, The Adoption of the Fourteenth Amendment (1908); Ten-Broek, the Anti-Slavery Origins of the Fourteenth Amendment (1951). § 1983 opened the Federal Courts to private citizens offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and Laws of the nation."

The three-judge District Court held that the evidence presented by the stipulation of facts and exhibits thereto showed that Defendants, Appellants, were possibly biased so that they could not conduct the fair, impartial hearing required if Plaintiffs were to be afforded the due process of law guaranteed by the Constitution of the United States. The District Court quoted from *In re Murchison*, 349 U. S. 113, as follows:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an

absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law'. Tumey v. Ohio, 273 U. S. 510, 532, 71 L. Ed. 749, 758, 47 Sup. Ct. 437, 50 A. L. R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. Offutt v. United States, 348 U. S. 11, 99 L. Ed 11, 75 Sup. Ct. 11."

The stipulated evidence upon which the decision was based clearly shows the bias and prejudice which permeated and surrounded the threatened State Board of Optometry hearings. Section 192 of Title 46, Code of Alabama 1940, provided that members of the Alabama Board of Optometry shall be "a member in good standing of the Alabama Optometric Association, Incorporated or its legal successor." It is undisputed that Defendants, present members of the State Board of Optometry, were selected in accordance with Section 192 as members have been selected in the past. The by-laws of the Alabama Optometric Association prohibit membership of any optometrists who are employed by

a corporation; thereby excluding Plaintiffs from membership in the Association from which Board members (R. 174, Order on Pretrial Hearing, paragraph 6D) of the profession's governing body, under Alabama law, must come.

It is stipulated in paragraph 7 of the stipulation (R. 195) that the Alabama Optometric Association consists of approximately 100 members and that the dues paid by its members are used to finance Association activities, and to defray legal expenses of investigating, initiating and prosecuting charges against the corporation-employed optometrists who are the Plaintiffs in this action. The Alabama Optometric Association and the Board have for several years been engaged in eliminating "corporate practice", in which the Plaintiffs-Appellees are alleged to be involved, either by being employed by Lee Optical Company or by practicing optometry on Lee's premises. In 1965 the Alabama Optometric Association procured the repeal of Section 210 of Title 46 of the Optometry Code of the State of Alabama, which section had required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Defendants, Gibson, Carlton, Smith, Ashbee and Warr (State Board Members) contributed to a legislative fund raised by the Alabama Optometric Association to lobby the repeal of these sections; the repeal of which makes the Plaintiffs practice illegal. [Under Defendants' theory].

Defendants Gibson, Ashbee, Carlton, Warr and Smith, presently members of the State Board of Optometry and also members of the Alabama Optometric Association. (R.195, Stipulation, par. 6) Dr. Thomas S. Gibson was a member of the legislative committee of the Association in 1965 and also a member of the State

Board of Optometry. In 1965, as President of the Board of Optometry, Dr. Gibson signed a sworn complaint in a civil suit which sought to prohibit these same Plaintiffs from practicing optometry in Alabama. (R. 195, Stipulation, paragraph 6; Exhibit 7 attached to Stipulation) At the time of the filing of the civil action in state court against Plaintiffs, Defendants, Gibson, Ashbee, Carlton and Smith were members of the Board. The civil suit alleged that Plaintiffs were guilty of lending their licenses to a corporation, employing Cappers and Steerers and various other offenses. The administrative charges, prosecution of which was enjoined by the three-judge District Court, were based on the same offenses as those the Board had declared Plaintiffs guilty of in the earlier filed civil suit. See affidavit of Roy C. Adams (R. 106) the basis of charges to be heard by the Board.

Subsequent to Dr. Gibson's verification of the bill of complaint in the civil suit, charges were made against the Plaintiffs which were to be heard and decided by the same State Board of Optometry, comprised of Defendants, Gibson, Ashbee, Carlton, Warr and Smith, all private practitioner members of the Alabama Optometric Association. (R. 195, Stipulation, paragraph 6; Exhibits 7, 8, 8A and 8B, attached to Stipulation) The objective of the Defendants' charges obviously was the revocation or suspension of the Plaintiffs' licenses; this being the only disciplinary measure available by law to the State Board of Optometry.

On the stipulated facts (R. 195, Stipulation, paragraph 13) the District Court in its Opinion correctly observed:

"In the instant case, there is evidence that those who

are to judge the matter of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs [Appellees] worked, issued over 75,000 eyeglasses in one year. Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business . . ."

The only substantial federal question possibly presented is whether the District Court erred in enjoining Defendants from proceeding with the pending hearings. Certainly, Plaintiffs would have been denied the right to a fair hearing before a fair and impartial tribunal and therefore subject to deprivation of their licenses to practice optometry without due process of law had the scheduled hearings been held.

The District Court in enjoining the Defendants, held Section 192 and 206 of Title 46, Code of Alabama, unconstitutionally applied as to these Plaintiffs, the Court stating:

"Pleadings and uncontradicted evidence in the instant case indicate that Plaintiffs have been actively practicing their professions since prior to 1965 and that the cases against them have been pending since that time, that the individuals who will act as judges of their cases are largely the same individuals who in 1965 supported prosecution of Plaintiffs for the very acts for which they are now being charged . . .

* * *

"Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have ap-

parent personal interest in the matter in controversy. This invades the very core of due process of law.

"... It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. Miller v. Aldridge, 212 Ala. 660, 103 So. 835; Miller v. Florida State Board of Dentistry, 296 F. Supp. 1259."

Defendants' admitted refusal to recuse themselves from the trial of Plaintiffs in light of their previous involvement in having the law changed to comply with their objectives to stifle competition, establishes beyond cavil that the prosecution of them by the Defendants to revoke their licenses is no more than another step in the process of securing to themselves a captive, non-competitive optometric business within the State of Alabama.

Plaintiffs' request for recusal of Defendants before filing of the complaint in this action, and indeed the order and opinion of the District Court, are not based upon the mere fact that Plaintiffs and Defendants share the same profession. Qualification and ethics regulations are not involved. What is involved is actual bias and prejudice on the part of Defendants based upon not only an identifiable and specific economic interest far exceeding the normal competition necessarily existing among all who pursue the same profession, but also based upon specific actions disclosed by the undisputed evidence before the District Court.

New Jersey State Board of Optometry v. Nemitz,

21 N. J. Super. 18, 90 A. 2d 740, is illustrative of Plaintiffs' position. In this case the New Jersey court in a situation similar to the instant one found that a board member, who was in direct competition with the accused optometrist, had made a complaint, had obtained services of a patient to act as investigator, and had provided funds, had therefore, clearly gone beyond his mere official duties and should have disqualified himself.

This Court has not altered its position as to protection of constitutionally protected rights. See *Boddie v. Connecticut*, ...U. S..... 28 L. Ed 2d 113, in which the following principal is stated:

> "[11] Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question . . ."

Thus, regardless of the constitutionality of the Alabama statute, in other and in proper circumstances, the particular facts of the Defendants in the posture and circumstances herein involved make the statute unconstitutional when applied to these Plaintiffs.

Defendants in an attempt to disguise the real question before the Court, the question which the Plaintiffs have heretofore proposed, have set out seven questions in their brief. These questions not only overlap one another and produce unnecessary reargument, but also assert matters which are moot or otherwise beyond the scope of the record and clearly immaterial.

Questions 1 and 2 are not material to this appeal in

that the three-judge District Court did not hold that Sections 192 and 206 of Title 46 were unconstitutional on their face. (R. 577) The District Court held that the stipulated evidence showed that the Defendants, members of the Board, were biased and exhibited prejudice as to these Plaintiffs so that the Defendants could not conduct a fair, impartial hearing guaranteed the Plaintiffs by the Constitution of the United States. Defendants quote extensively from the case of *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241, which Plaintiffs submit shows that the Alabama Optometric Association and the Board, as far back as October of 1954 were attempting to revoke the Plaintiffs' licenses to eliminate them from the practice of optometry. In *McCrory v. Wood*, *supra*, the written charges prepared by the Alabama Optometric Association were filed with the Board. These charges averred that Dr. McCrory, the optometrist employed by Lee Optical, (one of the Plaintiffs in this case before the Court) was guilty of unprofessional conduct in that he violated Article III of the Code of Ethics promulgated by the Alabama Optometric Association. Article III limited advertising to the use of a professional card when a new licensee opens a business or an established licensee changes the location of his old business. The State Board of Optometry proceeded to hear these charges in November of 1962 despite the fact that the Supreme Court of Alabama in the case of *Alabama State Board of Optometry v. Bush Jewelry*, 261 Ala. 479, 75 So. 2d 121, decided in October of 1954, held that Article III of the Code of Ethics of the Alabama Optometric Association was contrary to the grant of the right to advertise contained in Title 46 of Sections 210 and 211 as they existed prior to 1965 when the Alabama Op-

tometric Association and the Board procured the repeal of Section 210 and a modification of Section 211.

Plaintiffs submit that *McCrory v. Wood, supra,* is additional evidence of the fact that the Alabama Optometric Association and the Defendants as far back as November of 1962 were biased, exhibited prejudiced toward the Plaintiffs, harassed the Plaintiffs and were not in good faith attempting to regulate the practice of optometry within the State of Alabama. In 1965 after the Supreme Court of Alabama had made it clear for the second time that Sections 210 and 211 of Title 46 would not allow the Alabama Optometric Association and the Board to subject Plaintiffs and corporations who employed them, to the Association's rules, the Association mounted a state wide drive among its members to have Section 210 repealed and Section 211 modified. Having accomplished this, the Association and the Board again struck at the Plaintiffs by filing charges alleging the illegal practice involved in the case of *Lee Optical of Alabama v. State Board of Optometry,* .....Ala....., 261 So. 2d 17.

Plaintiffs submit that it is evident from this long history of harassment by the Alabama Optometric Association and its arm the Board, that the Defendants, members of the Board, are biased and prejudiced against the Plaintiffs so that the Plaintiffs cannot receive a fair, impartial hearing at their hands and that the Plaintiffs would suffer great and irreparable harm if the Defendants were permitted to decide whether they have the right to practice optometry within the State of Alabama and indeed their very existence in the State of Alabama.

Defendants' question number three is frivolous and

presents nothing for the Court to consider. Defendants argue that "Board Rule Number One" would supersede the revocation of the Plaintiffs' licenses to practice optometry. Even if the Defendants were correct in this assertion, what is to prevent them from changing this rule just as easily and quickly as they adopted the same? Plaintiffs submit that this rule affords them no protection and is a sham on the part of the Defendants and was adopted after this action was initiated in an attempt to forestall the relief granted.

Plaintiffs further submit that the Defendants argument at pages 25 through 30 of their brief has nothing to do with the question which Defendants have presented and indeed is at the very least moot in view of the Supreme Court of Alabama's decision in *Lee Optical Company of Alabama v. State Board of Optometry, supra.*

Defendants, still under question number three, pages 30 through 35 of their brief, state that there was nothing improper about Defendant Gibson verifying the bill of complaint filed in the state court and state that this action was not grounds for his disqualification. Defendants attempt to support this position by citing cases from sister states. Defendants, however, ignore *Miller v. Aldridge,* 212 Ala. 660, 103 So. 835, the Alabama law on this very point. In *Miller v. Aldridge, supra,* Miller, a certified public accountant, had been expelled from the Alabama Society of Public Accountants, a social organization by the State Board of Public Accountants, which was made up of members of the Association. The Supreme Court of Alabama noted:

"[4] The averments of the petition disclose that

these Appellees have been active in the prosecution of these charges which they are called upon to hear and determine, and have contributed funds to further the prosecution. It may be conceded, as suggested by counsel for Appellees, that the petition should be construed as showing their activity and contribution of funds to have occurred prior to their appointment as members of the board, but this would not materially affect the situation. In addition to these averments, it is charged that they are inimical to Appellant, both personally and professionally, have prejudged this case, and stated that, so far as they were concerned, his certificate 'now stood as revoked'. Under the averments Appellees are charged with a direct interest in the proceedings against him, and are both prosecutors and judges in the same cause. These averments, for the present purposes, being considered as admitted, we think very clearly place Appellees, within the influence of the rule of disqualification."

Questions four and five merely restate what the Defendants have already argued in questions number two and three and therefore, no further comment is necessary.

Argument under question number six is not relevant to the question before the Court and is now also moot by virtue of *Lee Optical Company of Alabama v. State Board of Optometry, supra.* Defendants in their argument under this question attempt to retry the state court case from the time of its filing to its final determination in the Supreme Court of Alabama, wherein the court expressly held that "an optometrist may accept employment from others." The Supreme Court of Alabama stated specifically:

"[7, 8] The purpose of our optometry act is to license and regulate those who examine eyes and prescribe eyeglasses. When that purpose is accomplished by a specific statutory provision it is not within the province of the court to read into it something not designed to protect the public interest. Our statutes were designed to protect the public, and not to confer favors upon optometrists, or any special group of optometrists. Certainly, there is a social interest involved in this situation in affording the public an opportunity of procuring prescription eyeglasses at the least cost, provided incompetents are not permitted to examine eyes. Our licensing provisions were designed to see that only persons qualified to do so would perform this service."

Question number seven is the catch-all question encompassing the six foregoing questions. Defendants, however, in this question, present for the first time on this appeal, the issue of Section 2283, the federal anti-injunction statute. As Plaintiffs have asserted earlier, this is the question before the Court. Plaintiffs submit that *Mitchum v. Foster*, ...U. S..... 32 L. Ed 2d 705, and the stipulated evidence before the District Court, including the exhibits attached to the pleadings theretofore filed, show that the order and judgment of the District Court enjoining the Defendants from hearing the charges which they preferred against the Plaintiffs was proper and necessary to prevent the Plaintiffs from suffering "great and irreparable harm".

CONCLUSION

It is respectfully submitted that Defendants, members of the Alabama State Board of Optometry and

members of the Alabama Optometric Association, were properly enjoined from conducting hearings of the charges theretofore preferred by the Defendants against the Plaintiffs and from revoking the licenses of the Plaintiffs to practice optometry within the State of Alabama. If the Defendants are permitted to hear these charges the Plaintiffs would loose their livelihood and would suffer great and irreparable harm. The unanimous decision of the District Court is therefore due to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the above and foregoing Brief of Appellees to J. G. L. Marston, III and Donald George Valeska, II, Assistant Attorneys General, Hon. William Baxley, Attorney General of Alabama, Hon. Richard A. Billups, Attorneys for the Appellants, by mailing a copy of same to them at their office addresses, first-class, postage prepaid mail this 22 day of September, 1972.

.....

Of Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
Sep. 3, 1971
JANE P. GORDON,
Clerk

By .....
Deputy Clerk

L. M. BERRYHILL, ET AL,
Plaintiffs
Vs.
THOMAS S. GIBSON, ET AL,
Defendants.

CIVIL ACTION
NO. 3339-N

STIPULATION

It is stipulated by and between the parties as follows:

1. Paragraphs 2, 3 (a), 3 (c), 4, 5 and 6 are admitted by all of the parties, both plaintiff and defendant.

2. At the time notice of the August 1970 hearings were given plaintiffs demanded that the respondent State Board of Optometry recuse itself, a copy of the demand being attached as Exhibit 1. Subsequently the August hearing was postponed by mutual agreement of the plaintiffs and defendant State Board with the stipulation that neither party's position would be al-

tered by doing so. This agreement is set out as Exhibit 2.

3. Plaintiff optometrists are all licensed, practicing optometrists in the State of Alabama. In October of 1965 when the original charges were preferred against them, they were all employees of Lee Optical Company of Alabama, Inc., a corporation. Lee Optical Company of Alabama, Inc., is a corporation engaged in the business of optical dispensing. It sells eyeglasses at an advertised price. Prior to October 1965 Lee advertised eyeglasses, advertised that it conducted or furnished eye examination by a registered optometrist on its premises. Exhibit 3 depicts advertisements and photographs of Lee's premises showing the advertising conducted upon its premises. The optometrists employed in the Lee stores were employed on a salary. No charge was made for eye examinations except instances where the patient did not need eyeglasses. In those instances a nominal charge was made for the examination which went into Lee's receipts with the optometrist getting no part of it. A copy of the employment contract in use between Lee and its optometrists at the time of the filing of the charges against the Lee optometrists is attached hereto as Exhibit 4 with deposition testimony of Dr. William B. McCrory who identified the employment contract.

4. In October of 1965 Lee modified its advertising program by taking out of any advertisements any references to optometrical examinations or optometric services. Its ad were directed toward the advertisement of eyeglasses. A copy of the ad in use which is typical of those used since October 1965 is attached hereto as Exhibit 5. The store windows of Lee Optical do not con-

tain any reference to an optometrist or that an optometrical examination is available inside the store.

5. In April 1970 Lee entered into a new agreement with its optometrists, a copy of which is attached hereto as Exhibit 6. This agreement in substance allowed the optometrist to lease the optometrical office and equipment from Lee, to occupy the space therein for the purpose of conducting eye examinations and to set his fee. Arrangements were made whereby the Lee clerical help collects the fees which are charges, posts them on a balance sheet and Lee remits the fees to the optometrist. There is no other pecuniary arrangement between the optometrist and Lee. All pension plans, withholding tax arrangements, group insurance plans and other employee benefits which had been available to the optometrists through Lee were discontinued as of April of 1970.

Under the present arrangements the optometrist conducts examinations in the leased premises within the Lee Optical dispensary. He does not pay any rent. The consideration to Lee is the availability of an optometrist to examine eyes of patients who come in without prescriptions for glasses. Lee receives no part of the fee for the optometric examination and the optometrist receives nothing from Lee by way of remuneration because of the sale of a pair of eyeglasses. The additional examination fee is now paid by the customer who comes in.

The optometrists in the Lee Optical stores do not advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

The optometrists in the Lee Optical stores do not

advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

6. Defendants Gibson, Ashbee, Carlton, Warr and Smith, members of the State Board of Optometry of the State of Alabama are also members of the Alabama Optometric Association. Dr. Thomas S. Gibson was a member of the Legislative Committee of the State Association in 1965 and also a member of the Board of Optometry. As President of the Board of Optometry he signed the complaint in a civil suit, the complaint in which is attached as Exhibit 7 by which he made affidavit as to the truth of certain charges against plaintiffs. Board members at the time of the filing of the complaint against plaintiffs were defendants Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Willard Smith and James L. Cash.

7. The Alabama Optometric Association consists of approximately 100 members. The dues paid by each member are $240.00 per year; of this $140.00 goes to the American Optical Association. These dues are used to finance the Association's activities and also to defray legal expenses of investigating and initiating charges against plaintiffs in this action. The Alabama Optometric Association has for several years been interested in eliminating "corporate practice" which the plaintiffs are alleged to be engaged in by being employed by Lee Optical Company or by practicing on its premises. In 1965 the Alabama Optometric Association was active in securing the repeal of Section 210 of Title 47 of the Optometry Code of the State of Alabama. This was the section which allowed and required any optical dispensary in which eyes were tested to be under the super-

vision of a registered optometrist. Defendants Gibson, Carlton, Smith, Ashbee and Warr contributed to a legislative fund raised by the Alabama Optometric Association to promote the repeal of these sections, the repeal of which allegedly makes the practice of plaintiffs illegal.

8. The State Board of Optometry has no rules or regulations governing the practice of optometry within the State of Alabama. The charges pertaining to the plaintiffs in this instance involve an alleged violation of the State Code regulating the practice of optometry as it presently exists.

9. It is stipulated by and between the parties that Section 210 of Title 47 was repealed August 4, 1965, that charges were initiated by the Alabama Optometric Association against plaintiffs and filed with the State Board October 23, 1965, a copy of the said charges made against each optometrist being the same as Exhibit 8 hereto made against Dr. Harry Sparks, that said civil suit was filed by the State Board against plaintiffs and Lee Optical on October 25, 1965, a copy of the complaint and exhibits thereto being attached as Exhibit 7.

10. Attached to the original of this stipulation are depositions of Dr. William B. McCrory and members of the State Board of Optometry taken May 21 and 22, 1970 and it is stipulated that the parties would so testify in this action.

11. It is further stipulated by and between the parties that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against plaintiffs and in his judgment could render a

fair and impartial verdict on the charges brought against them.

12. It is further stipulated that each of the plaintiffs if called to testify, would testify that Lee Optical Company of Alabama, Inc., had never interferred with his professional practice, called upon him to alter his judgment and that his professional judgment was in no way affected or impaired, nor was his allegiance to his patients impaired or affected by reason of the fact that he practiced on the premises of a dispensing optician.

13. Mr. Gene Shanbaum of Dallas, Texas, Secretary of Lee Optical Company, testified in the trial of *State Board v. Lee* in the Circuit Court of Montgomery County that he had checked the records of Lee Optical and that in 1969 Lee sold 75,000 pairs of glasses in Alabama.

14. The Alabama Legislature created the School of Optometry in 1968 to be located in the Medical Complex of the University of Alabama at Birmingham and it is now in its second year of teach optometry students.

15. Drs. Pillion and Sparks, who had formerly been employees of Lee and now practice as lessees on Lee's premises, testified in the *State Board v. Lee* trial that they made more money as lessees of Lee under their present arrangement than they had as a salaried employee for Lee.

16. Dr. Milton E. Warr was appointed to the State Board of Optometry on or about January 1, 1971 and prior to that time had no contact with the charges against the plaintiffs or the suit against Lee Optical Company.

17. The employment agreement which Lee had

with its optometrists prior to April of 1970 and the lease arrangement presently in use both contain a 10 day cancellation clause.

18. If called to testify Dr. George R. Carlton, a member of the State Board, will testify that by-laws of the Association provide that the Association recommend names to the Governor for appointment to membership on the State Board. The Association in years past has made this recommendation, but has rarely been followed by the Governor. In recent years no recommendation has been made. None of the present Board members were recommended by the Association for appointment. There is no provision in the optometry law which allows the Association to nominate Board members.

19. There is no provision in the optometry laws or elsewhere for the appointment of a new Board if the present Board is enjoined from hearing pending charges.

20. The House of $8.50 eyeglasses has now been decided by the Circuit Court in Birmingham and is in the process of being appealed; a copy of the Circuit Court decree is attached as Exhibit 9.

21. Section 210 of the optometry law was repealed on August 4, 1965. There was no change in the signs and advertising done in all the Lee stores until after the charges here involved were filed on October 23, 1965 and the suit filed against Lee and its optometrists several days later.

22. The State Board of Optometry adopted Resolution No. 1 on June 13, 1971; a copy of the Resolution being attached hereto as Exhibit 10.

23. All exhibits attached to pleadings, briefs or other documents heretofore filed with the Court are admitted as to genuineness and what they purport to be for the convenience of the court; however, by admission of documents of this stipulation, neither of the parties admit the relevance thereof as to the issues.

s/ DOUGLAS E. BERGMAN
Douglas E. Bergman

s/ HARRY COLE
Harry Cole
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s/ J. G. L. MARSTON III

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Richard A. Billups, Jr.
Attorney for Defendants

(Syllabus Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GIBSON ET AL. v. BERRYHILL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 71-853. Argued January 9–10, 1973—Decided May 7, 1973

Appellees, licensed optometrists employed by Lee Optical Co., who were not members of the Alabama Optometric Association (Association), were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (Board), all members of which were Association members. The Board deferred proceedings while a suit it had brought against optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry was litigated in the state trial court. The charges against the individual defendants were dismissed but the court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. When the Board revived the Association's charges against appellees, they sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The court concluded that it was not barred from acting by the federal anti-injunction statute since only administrative proceedings were involved and that exhaustion of administrative remedies was not mandated where the administrative process was biased in that the Board by its litigation in the state courts had prejudged the case against appellees and the Board members had an indirect pecuniary interest in the outcome. The District Court enjoined the Board proceedings but thereafter and before this appeal was taken, the State's highest court reversed the judgment against Lee Optical and held that the optometry law did not prohibit a licensed optometrist from working for a corporation. *Held:*

1. The anti-injunction statute did not bar the District Court from issuing the injunction since appellees brought suit under the Civil Rights Act, 42 U. S. C. § 1983. P. 8.

Syllabus

2. Nor did the rule of *Younger* v. *Harris*, 401 U. S. 37, or principles of equity require the District Court to dismiss appellees' suit in view of the pending Board proceeding since the appellees alleged and the District Court concluded that the Board's bias rendered it incompetent to adjudicate the issues. Pp. 11–13.

3. Since the Board was composed solely of private practitioners and the corporate employers it sought to bar from practice constituted half the optometrists in the State, the District Court was warranted in concluding that the Board members' pecuniary interest disqualified them from passing on the issues. Pp. 13–15.

4. Though the District Court did not abuse its discretion in not abstaining until the *Lee Optical* decision was rendered by the Alabama Supreme Court, the principles of equity, comity, and federalism warrant reconsideration of this case in the light of that decision. Pp. 15–16.

331 F. Supp. 122, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-653

Thomas S. Gibson et al., Appellants, v. L. M. Berryhill et al.	On Appeal from the United States District Court for the Middle District of Alabama.

[May 7, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Prior to 1965, the laws of Alabama relating to the practice of optometry permitted any person, including a business firm or corporation, to maintain a department in which "eyes are examined or glasses fitted" provided that such department was in the charge of a duly licensed optometrist. This permission was expressly conferred by § 210 of the Alabama Code of 1940, and also inferentially by § 211 of the Code which regulates the advertising practices of optometrists, and which, until 1965, appeared to contemplate the existence of commercial stores with optical departments.[1] In 1965, § 210 was repealed in its entirety by the Alabama Legislature, and § 211 was amended

[1] Sections 210 and 211 of c. 11, Tit. 46, of the Code of Alabama, 1940, provided, prior to 1965, as follows:

"§ 210. Store where glasses are sold; how department conducted.—Nothing in this chapter shall be so construed as to prevent any person, firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such a store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must

so as to eliminate any direct reference to optical departments maintained by corporations or other business establishments under the direction of employee optometrists.'

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appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation."

"§ 211. False or misleading statements in advertisements or stores having optometry department.—It shall be unlawful for any person, firm or corporation, engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. And it shall be unlawful for any individual, firm or corporation, engaged in the sale of goods, wares or merchandise who maintains or operates, or who allows to be maintained and operated in connection with said mercantile business an optometry department; or who rents or subleases to any person or persons for the purpose of engaging in the practice of optometry therein, any portion of or space in said store, premises or establishment in which such person, firm or corporation is engaged in said mercantile business, to publish, or circulate, or print or cause to be printed, by any means whatsoever, any advertisement or notice of the optometry department maintained, operated, or conducted in said establishment or place of business, in which said advertisement or notice appear any untruthful, improbable, impossible, or misleading statement or statements, or anything calculated to mislead or deceive the public."

Sections 199–213, regulating the practice of optometry in Alabama, were originally adopted in 1919.

Section 211, as amended, reads as follows:

"§ 211. False or misleading statements in advertisements or circulars.—It shall be unlawful for any person engaged in the practice of optometry in this state to print or cause to be printed, or circulate or cause to be circulated, or published, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public.

Soon after these statutory changes, the Alabama Optometric Association, a professional organization whose membership is limited to independent practitioners of optometry *not* employed by others, filed charges against various named optometrists, all of whom were duly licensed under Alabama law but were the salaried employees of Lee Optical Company. The charges were filed with the Alabama Board of Optometry, the statutory body with authority to issue, suspend, and revoke licenses for the practice of optometry. The gravamen of these charges was that the named optometrists, by accepting employment from Lee Optical, a corporation, had engaged in "unprofessional conduct" within the meaning of § 206 of the Alabama optometry statute, and hence were practicing their profession unlawfully.[3] More particularly,

[3] Section 206, insofar as relevant here, provides as follows:

"§ 206. License may be suspended or revoked.—A license issued to any person may be suspended for a definite period of time, or revoked by the state board of optometry for any of the following reasons, to-wit: . . . For unprofessional conduct. 'Unprofessional conduct' shall be defined to mean any conduct of a character likely to deceive or defraud the public, lending his license by any licensed optometrist to any person, the employment of 'cappers,' or 'steerers' to obtain business, 'splitting' or dividing a fee with any person or persons, the obtaining of any fee or compensation by fraud or misrepresentation, employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work, by use of any advertising, carrying the advertising of articles not connected with the profession, the employment of any drugs or medicines in his practice unless authorized to do so by the laws covering the practice of medicine of this state, or the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice."

The section also provides for a hearing before the Board upon due notice of an accused license holder. At such a hearing the accused is entitled to be represented by counsel, to cross-examine the witnesses against him, and to have all testimony taken down by a stenographer.

the Association charged the named individuals with, among other things, aiding and abetting a corporation in the illegal practice of optometry; practicing optometry under a false name; that is, Lee Optical Company; unlawfully soliciting the sale of glasses; lending their licenses to Lee Optical Company; and splitting or dividing fees with Lee Optical.[1] It was apparently the Association's position that following the repeal of § 210 and the amendment of § 211, the practice of optometry by individuals as employees of business corporations was no longer permissible in Alabama, and that by accepting such employment, the named optometrists had violated the ethics of their profession. It was prayed that the Board revoke the licenses of the individuals charged following due notice and a proper hearing.

Two days after these charges were filed by the Association in October of 1965, the Board filed a suit of its own in state court against Lee Optical, seeking to enjoin the company from engaging in the "unlawful practice of optometry." The Board's complaint also named 13 optometrists employed by Lee as parties defendant, charging them with aiding and abetting the company in its illegal activities, as well as with other improper conduct very similar to that charged by the Association in its complaint to the Board.

Proceedings on the Association's charges were held in abeyance by the Board while its own state court suit progressed. The individual defendants in that suit were dismissed on grounds that do not adequately appear in the record before us; and, eventually, on March 17, 1971, the state trial court rendered judgment for the Board, and enjoined Lee Optical both from practicing optometry

[1] Some of the charges leveled against the named optometrists are covered by sections of the Alabama optometry statute other than § 206, *e. g.*, "practicing optometry under a false name" (§ 191), "unlawfully soliciting the sale of glasses" (§ 203), etc.

without a license and from employing licensed optometrists.[3] The company appealed this judgment.

Meanwhile, following its victory in the trial court, the Board reactivated the proceedings pending before it since 1965 against the individual optometrists employed by Lee, noticing them for hearings to be held on May 26 and 27, 1971. Those individuals countered on May 14, 1971, by filing a complaint in the United States District Court naming as defendants the Board of Optometry and its individual members, as well as the Alabama Optometric Association and other individuals. The suit, brought under the Civil Rights Act, 42 U. S. C. § 1983, sought an injunction against the scheduled hearings on the grounds that the statutory scheme regulating the practice of optometry in Alabama[4] was unconstitutional insofar as it permitted the Board to hear the pending charges against the individual plaintiffs in the federal suit.[5] The thrust of the complaint was that the Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law.

A three-judge court was convened in August 1971, and shortly thereafter entered judgment for plaintiffs, enjoining members of the State Board and their successors

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[3] A period of nearly five and one-half years passed between the filing of the Board's complaint against Lee Optical, and the decision of the state trial court. Much of this delay appears to be attributable to certain procedural wranglings in the court concerning whether the Board had the power to bring an injunctive action against those it believed to be practicing optometry unlawfully. During the pendency of the litigation, the Alabama Legislature passed a statute expressly conferring such power, both prospectively and retroactively, on state licensing boards, and the suit appears to have proceeded expeditiously thereafter.

[4] Sections 190–213 of c. 11, Tit. 46, of the Alabama Code of 1940.

[5] More specifically, the plaintiffs attacked §§ 206 and 192 of the statute which provide, respectively, that the Board shall have the power to entertain delicensing proceedings and that its membership shall be limited to members of the Alabama Optometric Association.

"from conducting a hearing on the charges heretofore preferred against the plaintiffs" and from revoking their licenses to practice optometry in the State of Alabama.

In its supporting opinion, 331 F. Supp. 122, the District Court first considered whether it should stay its hand and defer to the then pending state proceedings—that is, whether the situation presented was one which would permit of immediate federal intervention to restrain the actions of a state administrative body. That question was answered in the affirmative, the court holding that 28 U. S. C. § 2283, the federal anti-injunction statute, was not applicable to state administrative proceedings even where those proceedings were adjudicatory in character. Moreover, the District Court also held that neither *Younger* v. *Harris*, 401 U. S. 37 (1971), nor the doctrine normally requiring exhaustion of administrative remedies forbade a federal injunction where, as the court found to be true here, the administrative process was so defective and inadequate as to deprive the plaintiffs of due process of law.

This conclusion with respect to the deficiencies in the pending proceedings against plaintiffs, although an amalgam of several elements, amounted basically to a sustaining of the plaintiffs' allegation of bias. For the District Court, the inquiry was not whether the Board members were "actually biased but whether in the natural course of events there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." Such a possibility of bias was found to arise in the present case from a number of factors. First was the fact that the Board, which acts as both prosecutor and judge in delicensing proceedings, had previously brought suit against the plaintiffs on virtually identical charges in the state courts. This the District Court took to indicate that members of the Board might have "preconceived

opinions" with regard to the cases pending before them. Second, the court found as a fact that Lee Optical Company did a large business in Alabama, and that if it were forced to suspend operations the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business. Thus a serious question of a personal financial stake in the matter in controversy was raised. Finally, the District Court appeared to regard the Board as a suspect adjudicative body in the cases then pending before it, because only members of the Alabama Optometric Association could be members of the Board, and because the Association excluded from membership optometrists such as the plaintiffs who were employed by other persons or entities. The result was that 92 of the 192 practicing optometrists in Alabama were denied participation in the governance of their own profession.

The court's ultimate conclusion was "that to require the plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, the right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events." [6]

Appeal was taken to this Court and probable jurisdiction noted on June 26, 1972. 408 U. S. 920 (1972). Meanwhile, on March 30, 1972, the Supreme Court of Alabama reversed the judgment of the state trial court in the *Lee Optical Company* case,[7] holding that nothing in the Alabama statutes pertaining to optometry evidenced "a legislative policy that an optometrist duly qualified and licensed under the laws of this State may not be em-

[6] The District Court also dismissed, without prejudice, the Board's counterclaim in the present suit which sought a judgment barring the plaintiffs from practicing optometry in Alabama.

[7] *See Lee Optical Company of Alabama* v. *Board of Optometry*, 286 So. 2d 17, rehearing denied April 27, 1972.

played by another to examine eyes for the purpose of prescribing eyeglasses."[10]

It is against this procedural background that we turn to a consideration of the issues presented by this appeal.

I

We agree with the District Court that neither statute nor case law precluded it from adjudicating the issues before it and from issuing the injunction if its decision on the merits was correct.

28 U. S. C. § 2283, the anti-injunction statute, prohibits federal courts from enjoining state court proceedings, but the statute excepts from its prohibition injunctions which are "expressly authorized" by another Act of Congress.[11] Last Term, after the District Court's decision here, this Court determined that actions brought under the Civil Rights Act, 42 U. S. C. § 1983, were within the "expressly authorized" exception to the ban on federal injunctions.[12] *Mitchum* v. *Foster*, 407 U. S. 225 (1972).

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[10] In a companion case, *House of $8.50 Eyeglasses* v. *State Board of Optometry*, 281 So. 2d 27 (1972), the Alabama Supreme Court reversed the judgment of another lower state court which had enjoined a corporation from unlawfully practicing optometry through its optometrist employee. In that case, the individual optometrists involved were also enjoined from unlawfully practicing their profession. Both injunctions were dissolved by the Alabama Supreme Court.

[11] 28 U. S. C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[12] The District Court held § 2283 inapplicable in the present case because the plaintiffs sought an injunction against a state administrative body and not a state court. Whether this distinction is tenable in all circumstances—even where the administrative proceeding is adjudicatory or quasi-judicial in character—we need not decide here since the present action was brought under 42 U. S. C. § 1983.

Our decision in *Mitchum*, however, held only that a district court was not absolutely barred by statute from enjoining a state court proceeding when called upon to do so in a § 1983 suit. As we expressly stated in *Mitchum*, nothing in that decision purported to call into question the established principles of equity, comity and federalism which must, under appropriate circumstances, restrain a federal court from issuing such injunctions. *Id.*, at 243. These principles have been emphasized by this Court many times in the past, albeit under a variety of different rubrics. First of all there is the doctrine, usually applicable when an injunction is sought, that a party must exhaust his available administrative remedies before invoking the equitable jurisdiction of a court. See, *e. g.*, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908); *Illinois Commerce Comm'n* v. *Thomson*, 318 U. S. 675 (1943). Secondly, there is the basic principle of federalism, restated as recently as 1971 in *Younger* v. *Harris*, 401 U. S. 37 (1971), that a federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances suggesting bad faith, harrassment or irreparable injury that is both serious and immediate. And finally, there is the doctrine, developed in our cases at least since *Railroad Commission* v. *Pullman*, 312 U. S. 496 (1941), that when confronted with issues of constitutional dimension which implicate or depend upon unsettled questions of state law, a federal court ought to abstain and stay its proceedings until those state law questions are definitively resolved.

In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise,

dissolution or factfinding is involved." But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U. S. C. § 1983. *McNeese v. Board of Education*, 373 U. S. 668 (1963); *Damico v. California*, 389 U. S. 416 (1967). Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide, for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees' law suit.[16]

[16] This exhaustion requirement does not apply generally to state "judicial," as opposed to "administrative," remedies. See *Bacon v. Rutland R. Co.*, 232 U. S. 134 (1914); *City Bank Farmers' Trust Co. v. Schnader*, 291 U. S. 24 (1934). The doctrine of exhaustion of administrative remedies should, however, be kept distinct from other equitable doctrines such as those exemplified in *Younger v. Harris*, 401 U. S. 37 (1971), and *Railroad Commission v. Pullman*, 312 U. S. 496 (1941), which do require federal courts to defer in appropriate circumstances to state judicial proceedings.

[17] State administrative remedies have been deemed inadequate by federal courts, and hence not subject to the exhaustion requirement, on a variety of grounds. Most often this has been because of delay by the agency, *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587 (1926), or because of some doubt as to whether the agency was empowered to grant effective relief, *Union Pac. R. Co. v. Board of Comm'rs of Weld County*, 247 U. S. 282 (1918); *McNeese v. Board of Education*, 373 U. S. 668 (1963). State administrative remedies have also been

II

This brings us to the question of whether *Younger* v. *Harris*, 401 U. S. 37 (1971), *Samuels* v. *Mackell*, 401 U. S. 66 (1971), or the principles of equity, comity and federalism for which those cases stand precluded the District Court from acting in view of the fact that proceedings against appellees were pending before the Alabama Board of Optometry. Those cases and principles would, under ordinary circumstances, forbid either declaratory judgment or injunction with respect to the validity or enforcement of a state statute when a criminal proceeding under the statute has been commenced. Whether a like rule obtains where state civil proceedings are pending was left open in *Younger* and its companion cases.

Appellants now insist not only that the issue is posed here by the pendency of proceedings before the state board, but also that the issue was actually decided following *Younger* by our summary affirmance in the case of *Geiger* v. *Jenkins*, 401 U. S. 985 (1971). In that case the State Medical Board of Georgia noticed hearings on charges filed against a medical practitioner who immediately brought suit in federal court under § 1983 seeking an injunction on the ground that the underlying statute the Medical Board sought to enforce was unconstitutional. The District Court dismissed the action without reaching the merits, holding that the state proceedings were "in the nature of criminal proceedings," sufficiently so in any event to trigger the 28 U. S. C. § 2283 bar to federal intervention. 316 F. Supp. 370 (ND Ga. 1970). The decision was appealed to this Court

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held inadequate, however, where the state administrative body was found to be biased or to have predetermined the issue before it. *Kelly* v. *Board of Education*, 159 F. Supp. 272 (MD Tenn. 1958).

and summarily affirmed without opinion but with citation to *Younger* and *Mackall*.

As frequently occurs in the case of summary affirmance, the decision in *Geiger* is somewhat opaque. We doubt, however, that it is controlling here. First of all, it appears from the jurisdictional statement and motion to affirm in *Geiger* that state criminal proceedings were pending at the time of the challenged dismissal of the federal case. Moreover, it also appears that subsequent to that dismissal the State Medical Board completed its proceedings and revoked Geiger's license, and that judicial proceedings to review that order were already under way in the state courts. Secondly, there is no judicial finding here as there was in *Geiger* that under applicable state law license revocation proceedings are quasi-criminal in nature; nor is the Alabama case law now cited for this proposition persuasive. See *State* v. *Keel*, 35 So. 2d 625 (1948). Finally, although it is apparent from *Geiger* that administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings, there remains the claim here, not present in *Geiger*, that the administrative body itself was unconstitutionally constituted, and so not entitled to hear the charges filed against the appellees.

Unlike those situations where a federal court merely abstains from decision on federal questions until the resolution of underlying or related state law issues[18]—a subject we shall consider shortly in the context of the present case—*Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts.

[18] See, *e. g.*, *Railroad Commission* v. *Pullman*, 312 U. S. 496 (1941); *England* v. *Louisiana State Bd. of Medical Exam'rs*, 375 U. S. 411 (1964); *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498 (1972).

Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger v. Harris* dismissal was lacking, for the appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. If the District Court's conclusion was correct in this regard, it was also correct that it need not defer to the Board. Nor, in these circumstances, would a different result be required simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings.[11] Cf. *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972).

III

It is appropriate, therefore, that we consider the District Court's conclusions that the State Board of Optometry was so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of appellees' licenses to practice optometry. We affirm the District Court in this respect.

The District Court thought the Board to be impermissibly biased for two reasons. First, the Board had filed a complaint in state court alleging that appellees had aided and abetted Lee Optical Company in the unlawful practice of optometry and also that they had engaged in other forms of "unprofessional conduct" which,

[11] This Court was assured at oral argument by counsel for both parties that Alabama law provides for *de novo* court review of decisions orders issued by the Board. Tr. of Oral Arg., pp. 5 and 19. Nonetheless, the District Court expressly found that the revocation by the Board of appellees' licenses to practice their profession, "together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage" to the appellees for which no adequate remedy is afforded by state law.

if proved, would justify revocation of their licenses. These charges were substantially similar to those pending against appellees before the Board and concerning which the Board had noticed hearings following its successful prosecution of Lee Optical in the state trial court.

Secondly, the District Court determined that the aim of the Board was to revoke the licenses of all optometrists in the State who were employed by business corporations such as Lee, and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama. Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the appellees.

The District Court apparently considered either source of possible bias—prejudgment of the facts or personal interest—sufficient to disqualify the members of the Board. Arguably, the District Court was right on both scores, but we need reach, and we affirm, only on the latter ground of possible personal interest.[7]

It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Tumey* v. *Ohio*, 273 U. S.

[7] The extent to which an administrative agency may investigate and act upon the material facts of a case and then, consistent with due process, sit as an adjudicative body to determine those facts finally has occasioned some divergence of views among federal courts. Compare *Amos Treat & Co.* v. *SEC*, 113 U. S. App. D. C. 100, 306 F. 2d 260 (1962), and *Trans World Airlines* v. *CAB*, 102 U. S. App. D. C. 301, 254 F. 2d 90 (1958), with *Pangburn* v. *CAB*, 311 F. 2d 349 (CA1 1963). See also *Mack* v. *Florida State Board of Dentistry*, 206 F. Supp. 1259 (SD Fla. 1962). We have no occasion to pass upon the issue here in view of our disposition of the present case.

510 (1927). And *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that "most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators." Davis, Administrative Law Text, 1972, § 12.04, p. 250, and cases cited. The District Court proceeded on this basis and, applying the standards taken from our cases, concluded that the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose. As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it.

IV

Finally, we do not think that the doctrine of abstention, as developed in our cases from *Railroad Commission* v. *Pullman*, 312 U. S. 496 (1941), to *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498 (1972), required the District Court to stay its proceedings until the appellees had presented unsettled questions of state law to the state courts. Those questions went to the reach and effect of the state optometry law and concerned the merits of the charges pending against the appellees, at the heart of which was the issue of whether Alabama law permitted licensed optometrists to be employed by business corporations and others. That central question was pending in the Alabama Supreme Court in the *Lee Optical Company* case at the time the District Court entered its order. As was noted earlier, however, appellees here had been dismissed from that case by the state trial court, and it was only after this dismissal, and after the Board had reactivated

its charges against them, that appellees sought relief in federal court.

Arguably, the District Court should have awaited the outcome of the *Lee Optical* appeal, a decision which might have obviated the need for an injunction in this case.[11] But the Board was pressing its charges against appellees without awaiting that outcome and, in any event, it appears that at least some of the charges pending against appellees might have survived a reversal of the state trial court's judgment by the Alabama Supreme Court. Under these circumstances, it was not an abuse of discretion for the District Court to proceed as it did.

Nevertheless, the Alabama Supreme Court has since rendered its decision not only in the *Lee Optical* case, but also in a companion case, *House of $8.50 Eyeglasses v. State Board of Optometry*, 281 So. 2d 27 (1972). See n. 10, *supra*. Individual optometrists were parties to that latter case, and the Alabama Supreme Court entered judgment in their behalf, holding that nothing in the State's optometry law prohibited a licensed optometrist from accepting employment from a business corporation. Whether this judgment substantially revitalizes the position of the Board with respect to the appellees here, or in any way makes unnecessary or removes the "equity" from the injunction entered by the District Court, we are unable to determine. But we do think that considerations of equity, comity, and federalism warrant vacating the judgment of the District Court and remanding the case to that court for reconsideration in light of the Alabama Supreme Court's judgments in the *Lee Optical* and *House of $8.50 Eyeglasses* cases. We in no way intimate whether or not the injunction should be reinstated by the District Court.

It is so ordered.

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[11] See *Askew v. Hargrave*, 401 U. S. 476 (1971).

SUPREME COURT OF THE UNITED STATES

No. 71-653

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[May 7, 1973]

MR. CHIEF JUSTICE BURGER, concurring.

I concur, although in my view the three-judge District Court would have been better advised, as a matter of sound judicial discretion, to have refrained from acting until the outcome of the *Lee Optical* appeal. See my dissenting opinion in *Wisconsin* v. *Constantineau*, 400 U. S. 433, 443 (1971).

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[May 7, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring.

I join the opinion of the Court except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U. S. C. § 1983 may have to exhaust administrative remedies. See *ante*, at 10. In my opinion, the inapplicability of the exhaustion requirement to any suit brought under § 1983 has been firmly settled by this Court's prior decisions, *McNeese* v. *Board of Education*, 373 U. S. 668, 671–672 (1963). See also *Houghton* v. *Shafer*, 392 U. S. 639 (1968); *King* v. *Smith*, 392 U. S. 309, 312 n. 4 (1968); *Damico* v. *California*, 389 U. S. 416 (1967).